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No. 90-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF RYE, NEW YORK; TOWN OF NORTH CASTLE, NEW YORK; CITY OF RYE, NEW YORK; TOWN/VILLAGE OF HARRISON, NEW YORK; TOWN OF NEW CASTLE, NEW YORK; TOWN OF MT. PLEASANT, NEW YORK; TOWN OF GREENWICH, CONNECTICUT; AIR CONSERVATION TRUST, INC.; AIRPORT CONCERN TEAM, INC.; WESTCHESTER COALITION TO LIMIT AIRPORT EXPANSION, INC.,

Petitioners,

— against —

SAMUEL K. SKINNER, Secretary of Transportation; JAMES B. BUSEY, Administrator, Federal Aviation Administration; THE FEDERAL AVIATION ADMINISTRATION; DANIEL J. PETERSON, Regional Administrator, Federal Aviation Administration; WILLIAM HANDEL, Manager Airports Division, Federal Aviation Administration; COUNTY OF WESTCHESTER, NEW YORK; ANDREW P. O'ROURKE, County Executive for the County of Westchester, New York; WESTCHESTER COUNTY BOARD OF LEGISLATORS; WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Federal Aviation Administration violate principles of fundamental fairness when it barred public consideration of its definitive analysis of the critical demand-capacity issues, and thereby violate its own regulations requiring public involvement throughout the development of the Westchester Airport Project?

2. Under Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) and later cases, when construing administrative agency regulations that require public involvement in environmental decision making, what standards of construction should federal courts follow in cases where agencies have violated principles of fundamental fairness in informal adjudication?

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IN THE

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OCTOBER TERM, 1990

No. 90-

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Petitioners,

v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, denying the petition for review of the Orders of Samuel K. Skinner, Secretary of Transportation, is reported at 907 F.2d 23 (2d

Cir. 1990). It is reproduced in the Appendix to this Petition at A-1-6.[1] The unreported administrative opinions of the Federal Aviation Administration (the "FAA") involved in these proceedings are the Record of Decision ("ROD") dated November 30, 1989, the Finding of No Significant Impact ("FONSI") dated November 30, 1989, and the Airport Layout Plan ("ALP") Approval dated February 28, 1990. These opinions are reproduced at A-7-45.

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[1] References to the decision below and other documents reproduced in the Appendix are hereinafter designated parenthetically as "A-" followed by the Appendix page number(s) on which the referenced material appears.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 25, 1990. This petition is filed within 90 days thereof pursuant to 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following regulatory order is involved in this case.

Federal Aviation Administration Order 5050.4A § 18(a):

> Citizen involvement, where appropriate, should be initiated at the earliest practical time and continued throughout the development of the proposed project in order to obtain meaningful input. Examples of citizen groups are: environmental, conservation, public service, education, labor, business, or

aviation and airspace user organizations, and citizen advisory committees.

Federal Aviation Administration

Order 5050.4A §18(b):

> While requests for Federal airport actions originate with a local public agency, the involvement of the community at large is a necessary element in the decisionmaking process. An effective opportunity to comment at appropriate stages in the decisionmaking process shall be provided to communities, citizen groups, and other individuals affected by airport proposals submitted to the FAA. They shall also be provided an opportunity to review and comment on draft and final statements. In order to provide an effective opportunity for comment when significant portions of the affected public have a native language other than English, environmental documents may be provided or public hearings conducted in such native language.

STATEMENT OF THE CASE

This case raises the issue of the standard of construction of administrative agency regulations which contain ambiguous mandates of public involvement in informal adjudication.[2] Petitioners urge that Federal Aviation Administration Order 5050.4A ("Order 5050.4A") be construed in accordance with Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., ("Vermont Yankee") 435 U.S. 519 (1978), to effect fundamental

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[2] The "vast majority" (Scalia, A., "Vermont Yankee: the APA, the D.C.Circuit, and the Supreme Court," 1978 Sup.Ct. Rev. 345, 385 (hereinafter "Scalia")), "possibly 90%" (1 Davis, Administrative Law Treatise, 14 (2d Ed. 1978)), of all administrative actions fall into this category.

fairness principles.

In these proceedings, brought under 49 U.S.C. § 1486, petitioners sought review of the ROD, FONSI, and ALP Approval issued by the FAA for a new passenger terminal and related facilities for the Westchester County Airport in New York (the "airport project" or the "project"). Petitioners, who include municipalities and citizens groups in the area surrounding the airport, have opposed the airport project out of concern for the potential environmental impacts of the facility.[3]

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[3] The project has required environmental review under both federal law and New York State law. New York State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law §§8-0101 et seq., National Environmental Policy Act (continued...)

Since environmental impacts are a function of the increase in the use of the airport, both opponents and proponents of the project have focused on the demand for flights to and from the airport and the capacity of the airport. For a number of years the project sponsor, Westchester County ("the County"), and FAA took the position that various contractual restraints would limit the demand and capacity sufficiently to prevent any significant increase. In November 1988, as a result of public comment the County acknowledged that the contractual

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[3](...continued)
("NEPA"), 42 U.S.C. §§ 4321 et seq., the Regulations of the Council on Environmental Quality (the "CEQ Regs."), 40 C.F.R. Part 1500, and Order 5050.4A.

restraints were insufficient. It adopted a second analytical approach and took the position that operational restraints, would effectively limit demand and capacity at the airport.[4] The agency invited comments on this second approach. Faced with the demonstration in comments that operational restraints would not be effective and that a market analysis was necessary, FAA adopted a third analytical approach. The agency then performed a market

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[4] Operational restraints are physical and safety restraints on the number and size of aircraft and passengers that use the airport and terminal. Contractual restraints are contained in a set of agreements and statements. These documents included a "Stipulation and Order of Partial Agreement and Dismissal," a County Policy Statement, and a "Terminal Capacity Agreement" dated April 1, 1988.

analysis. The FAA did not allow public comment on this third approach. It reached its final finding of no significant impact based on this market analysis which was not subject to public comment. The market analysis was entitled "Demand, Capacity and Operational Analysis of Westchester Airport" (the "October 1989 Analysis" or "OA") (A-49-77), and attached to the ROD and FONSI.

The Public's Involvement

Throughout the environmental review process,[5] petitioners with

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[5] FAA's analysis and the related public involvement included a Master Plan for the project developed between 1978 and 1980; a Master Plan Update (December 1986); an (continued...)

FAA's encouragement had participated

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[5](...continued)
October 1986 Draft Environmental Assessment (Draft EA); a November 13, 1986 public hearing; a February 1987 EA; an August 1988 site specific Draft EA; comments by petitioners' attorneys on this Draft EA; a public hearing on the site specific Draft EA on October 14, 1988; a Final EA dated November 1988 (A-19); comments on the Final EA dated December, 1988; a Preliminary Analysis ("PA") dated March 1989; comments by petitioners and their airport consultants on the PA (A-95-116); the October 1989 Analysis made known to the public November 30, 1989 (A-7-14); and the Record of Decision (A-7-14) and the Finding of No Significant Impact (A-15-45) promulgated November 30, 1989. On February 28, 1990, the New York Department of Transportation approved the Airport Layout Plan ("ALP"). (See generally, A-19-21).

By means of subtle interpretations of NEPA and SEQRA, the various federal draft and final environmental assessments also served as generic draft, and final environmental impact statements under the state law. They are referred to herein by their federal designations only.

actively in the project review. The Draft and Final EA, for instance, had discussed only contractual restraints. Petitioners' comments pointed out the limitations and weaknesses of these restraints, including reliance on a stipulation which expired on April 30, 1990, and on an agreement which expires on January 1, 1995. As a result of these comments the final site-specific EA of November 1988 addressed operational restraints for the first time.

The December 1988 comments on the Final EA described the significant problem with the operational restraints analysis, including the increase of open space, which could lead to more intensive use of the

airport. The March 1989 PA, which followed these comments, was a forecast of operational restraints: the "hourly passenger limit or worst case scenario." (A-59-60.) The OA in contrast, used a market forecast as the basis for evaluating the impacts of the project.

Relying on this market analysis, FAA produced the ROD and FONSI which concluded that the project would not result in a significantly greater use of the airport. These determinations were made despite the more than fourfold increase in the size of the terminal and the provision of an indoor parking facility. (A-13-14, 16-17.) (The existing terminal building, a Quonset hut structure, has a floor area of

10,000 square feet. At present there is no indoor parking.)

The October 1989 Analysis

The market analysis appeared for the first time in the October 1989 Analysis. Although FAA had followed its regulations and allowed public comment up to the time of the issuance of the OA, and although this public comment process had revealed numerous flaws in FAA's analysis of the project, FAA did not allow any public comment on the OA. The OA was based upon substantially new facts and new assumptions, yet came to the same conclusions as the earlier flawed environmental documents.

This result disregarded the

fire code and other safety provisions limiting the present building to 480 passengers per hours. (A-50, 63.) It assumed, apparently, that those limits would be generally violated to reach the 680 passenger per hour limit. In addition, the OA posited new "turn-around times" (A-101-03, 115) and a growth in emplanements from the current 340,000 to 650,000 in the year 2006 (A-57). It assumed that passengers from the Westchester County Airport would have the same destinations as those from LaGuardia. (A-56.)

Among the other critical elements of the OA that were not subject to public comment was its "Forecast of Expected Terminal Activi-

ty." (A-52-59.) That forecast consisted of nine separate steps including projections of annual enplanements in the year 2006 and the use of 1988 monthly, day-of-the-week, and hourly relationships to reconstruct a busy day in the peak month of the year 2006. (A-53.)

This October 1989 Analysis, without public comment, became the basis for the principal finding of the ROD and FONSI, that the project would not appreciably increase use of the airport. Two months later when the ROD and FONSI were promulgated and released, the existence of the OA became known to the public. Public involvement had ended, however, with comments on the differently based PA.

The Proceedings in the Second Circuit

The petition to review the ROD and FONSI was filed in the Second Circuit on January 24, 1990 and the petition to review the ALP Approval was filed on March 19, 1990.

Petitioners argued that the FAA had violated lawful procedures and principles of fundamental fairness by relying upon the facts and assumptions developed after the Final EA, including those developed by the OA; and that it also violated the requirements of State and local review of the Project.

In addition they argued that, since the impacts of the four-fold increase in the terminal would be significant, FAA acted arbitrarily

and capriciously in issuing the FONSI and ROD; that FAA failed to consider adequately the cumulative impacts of the airport project and an adjoining major United States Postal Service project; that FAA failed to consider the controversy surrounding the project; and that the discussion of alternatives was substantially insufficient.

Finally, petitioners asserted that the issues before the court were not ripe for review.

In its decision denying the petitions for review the Second Circuit first denied petitioners' claim that the issues were not ripe for review. (A-3.) With respect to petitioners' claim that the post-Final EA procedures followed by FAA,

particularly the principal reliance upon the OA, violated lawful procedures, the court held that the procedures did not violate NEPA. Acknowledging that "NEPA and the regulations promulgated under it encourage[d] public involvement" the court held that FAA had done all that NEPA required. (A-4) (emphasis supplied). The decision did not comment at all upon the claims by petitioners that the major reliance by FAA upon the OA violated "fundamental fairness" principles.

REASONS FOR GRANTING THE WRIT

POINT I

THE FAA PROCEDURES WITH REGARD TO PUBLIC COMMENT ON THE OCTOBER 1989 ANALYSIS VIOLATED PRINCIPLES OF FUNDAMENTAL FAIRNESS

A. Public Involvement is Vital to Agency Processing Under NEPA

Despite FAA's failure to circulate the October 1989 Analysis for public comment, the Second Circuit rejected petitioners' claim that FAA violated NEPA.

> While NEPA and the regulations promulgated under it encourage public involvement in the preparation of environmental assessments ... the FAA more than complied with this requirement.

(A-4) (emphasis supplied) citing Hanly v. Kleindienst ("Hanly"), 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

Petitioners submit that the Second Circuit erred here. Hanly itself, decided early in the history of NEPA, did much more than "encourage" public involvement. In Hanly the court articulated the mandatory nature of public participation, ruling that:

> before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision.

471 F.2d at 836. See also Colony Federal Savings & Loan Ass'n v. Harris, 482 F. Supp. 296, 304 (W.D.Pa. 1980) (holding that "(a)n opportunity for local citizens or other interested parties to participate in the preparation of

the environmental analysis is mandatory under NEPA" (emphasis in original)).

The parties do not dispute that the numerous FAA actions concerning the airport project constituted a "major federal action". Nor do they dispute that the FAA's FONSI constituted its "threshold decision". See Hanly, 471 F.2d at 836. Rather, the disputes have centered on the nature and degree of the environmental impacts and the opportunity for public involvement.

B. Public Involvement Under Order 5050.4A

"Public Involvement" is the subject of §18 of Order 5050.4A, which prescribes the FAA's "General

Requirements and Responsibilities."

Subsection "a." directs that:

> Citizen involvement, where appropriate, should be initiated at the earliest practical time and continued throughout the development of the proposed project in order to obtain meaningful input.

(Emphasis supplied.) Subsection "b." further provides that:

> An effective opportunity to comment at appropriate stages in the decision making process shall be provided to communities, citizen groups, and other individuals affected by airport proposals submitted to the FAA.

(Emphasis supplied.)

The phrase "throughout the development of the proposed project" includes the stage when the agency determines whether "the action choice will be an environmental impact statement or a finding of no significant impact...." Order

5050.4A § 51(a). Since the OA's new market based analysis, provided the facts and assumptions for the FONSI, it was a vital stage in "the development of the proposed project." The absent peer review would have furnished "meaningful input." An "effective opportunity to comment" was necessary, but denied, at this climactic point.

FAA defends its procedures, and the decision below implicitly adopts that defense, by crediting itself with the public involvement in hearings and comments, and with acknowledging its own errors. Petitioners submit, however, that the public involvement thus permitted and the acknowledged importance of it only highlight the fundamental unfairness

of cutting off comment at the crucial OA stage.

In construing Order 5050.4A § 18(a), FAA erred in cutting off the public involvement at the OA stage. The agency violated general principles of fundamental fairness, particularly the principle that where there is public involvement in the NEPA process the public should have available to it for comment all of the significant data and information upon which the decision making is to be based.

C. Fundamental Fairness Through Public Particpation

The rule of "fundamental fairness," is found in Bowman Transportation, Inc. v. Arkansas-Best

Freight System, Inc. ("Bowman"), 419 U.S. 281 (1974). This Court recognized there that a party to an administrative hearing is entitled as a matter of constitutional due process "to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." Id. at 288 n.4 (emphasis supplied). FAA did not provide an opportunity to rebut such factual material here.

Lower courts have also applied the fundamental fairness principle stated in Bowman to informal agency adjudication. For example, the Court of Appeals in National Wildlife Federation v. Marsh ("NWF v. Marsh"), stated that:

> Even in an informal adjudicatory setting, if the public is not apprised of the rationale behind a proposed decision, or if the public is informed of the rationale only after the close of the comment and hearing period, then the agency cannot be said to have provided a realistic opportunity for public hearings or meaningful comments.

568 F. Supp. 985, 993 (D.D.C. 1983) (challenging the Army Corps of Engineers' issuance of a permit for construction and dredging in the Chesapeake Bay where the Corps impermissibly failed to "present for public scrutiny the rationale and pivotal data" underlying its decision before the end of the comment period).

NWF v. Marsh relied on the "admonition concerning the lack of meaningful comment and hearing"

found in United States Lines, Inc. v. Federal Maritime Commission ("U.S. Lines"), 584 F.2d 519 (D.C. Cir. 1978). NWF v. Marsh, 568 F. Supp. at 93 n.14. The U.S. Lines court observed that this principle of fairness applied to informal rule making. The court stated that

> agencies may rely upon data in their files in reaching their decisions. But [the informal rule making cases] do not hold that an agency may do so without informing the parties of what data it has utilized.

Id. at 534 n.44 citing Moss v. Federal Power Commission, 502 F.2d 461, 465 (D.C. Cir. 1974), rev'd in part on other grounds, 424 U.S. 494 (1976) and Consumers Union of U.S., Inc. v. Consumer Product Safety Commission, 491 F.2d 810, 812 (2d Cir. 1974).

The principle of U.S. Lines was reaffirmed: "even in an informal adjudication parties have a right to be informed of and comment on staff positions." Independent U.S. Tanker Owners Committee v. Lewis ("Independent U.S. Tanker"), 690 F.2d 908, 925 (D.C. Cir. 1982) (involving informal adjudication and rule making relating to construction subsidies for shipbuilding by the Maritime Administration). Of the Federal Maritime Commission's failure to provide an opportunity to comment on the report that was the basis for the agency decision, the court stated "[a]ll standards of fairness and due process in administrative law preclude such behavior." Id.

Similarly, in National Wildlife Federation v. Burford, 835 F.2d 305, 322-23 (D.C. Cir. 1987), the court applied principles of public participation to decisions involving the revocation of land withdrawals under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 et seq. Like the FAA, the Bureau of Land Management was required to allow for public participation on decisions affecting large-scale programs for the sale of public lands.

In Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105 (D.N.H. 1975) where a Final Environmental Impact Statement ("EIS") included traffic data on a proposed inter-state highway which had been omitted

from the Draft EIS, principles of fundamental fairness were applied under NEPA. The court ruled the EIS improper and enjoined construction. It severely criticized the agency's attempt to put the information in the Final EIS and thus circumvent the NEPA mandates respecting the adequacy of the draft EIS:

> [T]he first stage ... is the vital stage, for it is here that outside review can vitiate 'objective errors or excessive bias in an EIS.'

394 F. Supp. at 121 (citation omitted). The court went on to point out the dangers of including essential data in the Final EIS for the first time:

> There cannot be responsible decision making when data appears in the final EIS <u>without being subject to the critical evaluation that occurs in the</u>

> draft stage. There are two dangers that can occur when information appears in the final EIS for the first time: (1) the ultimate decision-makers will believe that there is no controversy due to the lack of critical comment; and (2) objective errors without being red-flagged would go unnoticed....
>
> Supplemental information, which has not been processed in the same manner as a draft EIS, cannot resurrect a deficient impact statement.

394 F. Supp. at 121-22 (emphasis supplied) (citations and footnotes omitted). See also Essex County Preservation Ass'n v. Campbell, 399 F. Supp. 208, 215-16 (D. Mass. 1975), aff'd, 536 F.2d 956 (1st Cir. 1976); Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 170 (D.D.C. 1972) (court refused to dissolve preliminary injunction enjoining the sale of

certain oil and gas leases where adderdum prepared to remedy the deficient Draft EIS had not been subject to comment and review procedures).

Last term this Court considered the application of the principles of fundamental fairness in Pension Benefit Guaranty v. LTV Corp., ("PBGC v. LTV"), ___ U.S. ___, 110 S.Ct. 2668 (1990). This Court addressed the question of what procedural rights applied under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. ("APA"), in the absence of applicable agency regulations. No regulatory provisions supported the procedural rights described in Bowman. The Court, following Vermont Yankee and

reversing the Second Circuit, ruled that additional procedures, even any required by principles of fundamental fairness, could not be imposed by the courts.[6] PBGC v. LTV at 2680. The Court did not question the validity of the fundamental fairness principles found in Bowman and elsewhere. Rather it found that in the absence of agency regulations it was not unlawful to fail to provide these elements of fundamental fairness.

Each of the cases discussed above supports the conclusion that

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[6] This Court apparently assumed that even "extremely exceptional circumstances" standing alone, would not justify judicial interference in administrative proceedings although they would under Vermont Yankee. Petitioners do not pose that question.

the FAA violated principles of fundamental fairness when it barred the public from commenting on the OA given its critical role in the decision making process. Like the factual material referred to in Bowman, like the staff report relied on in Independent U.S. Tanker, like the information withheld in U.S. Lines, and like the transportation data obscured in NWF v. Marsh, the October 1989 Analysis in this case contained the pivotal market-based review that should have been subject to comment as a matter of fundamental fairness. Accordingly, petitioners submit that FAA violated Order 5050.4A § 18(a).

POINT II

IN THE ERA OF VERMONT YANKEE THE STANDARDS OF CONSTRUCTION OF ADMINISTRATIVE REGULATIONS REQUIRING PUBLIC INVOLVEMENT IN INFORMAL AGENCY ADJUDICATIONS SHOULD GIVE WEIGHT TO PRINCIPLES OF FUNDAMENTAL FAIRNESS

This Court has said in Vermont Yankee and again in PBGC v. LTV that unless the APA, agency regulations or statutes, or constitutional due process provide otherwise, courts may not impose additional procedures on agencies. 435 U.S. at 543; 110 S.Ct. at 2680. Here, the regulations of FAA are ambiguous. They can be read to require public comments, or not, at the critical OA stage. The Court here has the opportunity to address the standards that should be applied when interpreting such agency

regulations. A standard of construction that favors public involvement will further these principles of fundamental fairness and will avoid unnecessary questions of constitutional due process.

The cases discussed above show that courts have recognized and discussed the importance of allowing the public to know and comment on the basis of agency decisions. This Court should integrate such concepts of fundamental fairness into the standards for construing regulations.

In the present case, FAA's narrow interpretation of its regulations erred because the agency failed to account for fundamental fairness principles. FAA did not

deem public involvement "appropriate" at the critical OA stages of "the development of the proposed project." Order 5050.4A § 18(a). The question of how to construe FAA's regulations governing public participation is of wide importance because the regulations of most important agencies acting under NEPA require public involvement in their ever increasing informal decision making.[7]

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[7] Among the agency regulations requiring public involvement in the NEPA process are: 7 C.F.R. §3100.45 (Office of Environmental Quality, U.S. Department of Agriculture); 18 C.F.R. §§ 401.51, 401.58, 401.61 (Delaware River Basin Commission); 33 C.F.R. §§ 230.11, 230.12, 230.19 (Army Corps of Engineers); 40 C.F.R. §§ 6.400, 6.403, 1501.4(e)(2) (Environmental Protection Agency); 44 C.F.R. §§10.5(a)(5), §10.7(a), (c)(2), (continued...)

The growth of informal adjudication increases the need for a common law of procedures. Justice Scalia, then Professor of Law at the University of Chicago Law School, described the cumulative effect of the growth of informal adjudications.

> [B]y the mid-1970s vast numbers of issues of the sort which in 1946 would have been resolved in a formal adjudicatory context before the agency, or even in an adjudicatory judicial proceeding, were being resolved in informal rule making and informal adjudication.

Scalia at 377. Speaking further of the importance of informal adjudication, Justice Scalia stated:

> Since informal adjudication undoubtedly constitutes the

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[7](...continued)
10.9(c) (Federal Emergency Management Agency).

> vast majority of agency actions, it is quite simply inconceivable that - confronted by a total vacuum in the APA - the courts will abstain from developing a "common law" of procedures in this area. Even if the Supreme Court persists in its Vermont Yankee abnegation of such a power, it can achieve the same result by simply finding a whole spectrum of "due process" requirements for less than an "on-the-record" hearing.

Scalia at 385 (emphasis supplied) (footnote omitted).[8]

One of the inherent defects in the APA "is its failure to provide any minimum structured procedures whatever for [the] entire [informal adjudication] category of agency activity." Scalia at 384-85.

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[8] The footnote cites 1 Davis Administrative Law Treatise 610 (2d Ed. 1978) and states that "Professor Davis's guess of 90 percent is as good as any."

Petitioners urge this Court to address this defect by ruling on the standards by which agency rules requiring public involvement should be construed. They urge the Court to recognize that rules of construction should move agencies toward fundamental fairness.

The Second Circuit determined that FAA did not violate Order 5050-.4A § 18(a). It did so without considering the fundamental unfairness of FAA's barring of the public from consideration of the OA, or even from knowing of the OA's existence until the decisions based largely upon it were made. The Second Circuit found it unnecessary to consider Vermont Yankee and PBGC v. LTV to determine their

applicability.[9] Consideration is necessary, however, unless it is absolutely clear 1) that the FAA regulation does not require involvement of the public in the OA and the decision making based upon it, and 2) principles of fundamental fairness are irrelevant to the construction of a regulation providing for public involvement. Petitioners submit that neither of

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[9] In its Brief in the Second Circuit FAA cited Vermont Yankee for the proposition that, "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." It also, in a letter to the Second Circuit following this Court's decision in PBGC v. LTV, cited that case as having "rejected a claim that the agency process was flawed for failure to include procedures not called for by the Due Process Clause, the Administrative Procedure Act or the specific provisions of an agency's opening statement."

these propositions is clear.

In this case of informal decision making, with procedures based on ambiguous regulations of the FAA, the Court has the opportunity to address the question of how agency regulations requiring public involvement should be interpreted.

The importance of proper construction and implementation of the plethora of public involvement regulations, particularly in fundamental fairness cases, is heightened by recent rulings that procedural due process does not require trial-type procedures such as examination and cross-examination in cases of informal adjudication. Buttrey v. United States, 690 F.2d 1170 (5th Cir. 1982), cert. denied, 461 U.S. 927

(1983) (holding developer not entitled to trial-type hearing on application to the Corps of Engineers for permit to discharge dredged materials). Such cases, underscore the important roles that agency procedures for public involvement play in achieving fundamental fairness. Since Vermont Yankee and PBGC v. LTV restrain courts from imposing additional procedures, fair construction of ambiguous agency procedures is particularly important.

FAA unfairly closed off the public from involvement in the critical OA aspects of "the development of the [airport] project." Order 5050.4A § 18(a). This Court should consider the question

of the standards by which this agency's public involvement regulations should be construed under Vermont Yankee and PBGC v. LTV in order to effect fundamental fairness.

Justice Scalia's opinion that the development of a "common law of procedures in [the] area" of informal adjudication seemed inevitable is particularly significant with respect to the rights of the public under most environmental laws and regulations. Most agency environmental decision making is by informal adjudication. Often citizen representatives become parties to such proceedings through grants of

standing both in case law[10] and in statute.[11] The rights of the public in such proceedings are as important as those of private parties in most trial-type proceedings and the principal facts in issue - e.g., the effect upon airport use of a terminal quadrupled in size - are as worthy of procedures which permit rebuttal of important facts as those in most trial-type proceedings. Some "'common law' of procedures"[12] should be developed. This case is an apt one for examination into and declaration of one small but

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[10] See, e.g., United States v. SCRAP, 412 U.S. 669 (1973).

[11] See, e.g., the citizens suit provisions of the Clean Air Act, 42 U.S.C. §7604.

[12] Scalia at 385.

important aspect of that common law.

CONCLUSION

For the foregoing reasons this Petition for the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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Lydia B. Duff
On the Petition

GLOSSARY OF ACRONYMS

ALP	-	Airport Layout Plan
APA	-	Administrative Procedure Act
CEQ	-	Council on Environmental Quality
EA	-	Environmental Assessment
EIS	-	Environmental Impact Statement
EPA	-	Environmental Protection Agency
FAA	-	Federal Aviation Administration
FEIS	-	Final Environmental Impact Statement
FEMA	-	Federal Emergency Management Analysis
FONSI	-	Finding of No Significant Impact
NEPA	-	National Environmental Policy Act
OA	-	October 1989 Analysis - Demand, Capacity and Operational Analysis of Westchester Airport
PA	-	Preliminary Analysis
ROD	-	Record of Decision
SEIS	-	Supplemental Environmental Impact Statement
SEQRA	-	State Environmental Quality Review Act
USDA	-	United States Department of Agriculture

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1513, 1599—August Term, 1989

(Argued June 13, 1990 Decided June 25, 1990)

Docket Nos. 90-4016, 90-4036

TOWN OF RYE, NEW YORK, TOWN OF NORTH CASTLE, NEW YORK, CITY OF RYE, NEW YORK, TOWN/VILLAGE OF HARRISON, NEW YORK, TOWN OF NEW CASTLE, NEW YORK, TOWN OF MT. PLEASANT, NEW YORK, TOWN OF GREENWICH, CONNECTICUT, AIR CONSERVATION TRUST, INC., AIRPORT CONCERN TEAM, INC., and WESTCHESTER COALITION TO LIMIT AIRPORT EXPANSION, INC.,

Petitioners,

—v.—

SAMUEL K. SKINNER, Secretary of Transportation, JAMES B. BUSEY, Administrator, Federal Aviation Administration, THE FEDERAL AVIATION ADMINISTRATION, DANIEL J. PETERSON, Regional Administrator, Federal Aviation Administration, Eastern Region, WILLIAM HANDEL, Manager, Airports Division, Federal Aviation Administration, COUNTY OF WESTCHESTER, NEW YORK, ANDREW P. O'ROURKE, County Executive for the County of Westchester, New York, WESTCHESTER COUNTY

BOARD OF LEGISLATORS and WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION,

Respondents.

Before:

MESKILL, PIERCE and PRATT,
Circuit Judges.

Petitions for review pursuant to 49 U.S.C. § 1486 of two orders of the Federal Aviation Administration that approved various proposed projects at the Westchester County Airport.

Petitions denied.

DAVID SIVE, New York City (Richard M. Hall, Andrew J. Gershon, Sive, Paget & Riesel, New York City, of counsel), *for Petitioners.*

VICKI L. PLAUT, Department of Justice, Environment and Natural Resources Division, Washington, D.C. (Richard B. Stewart, Peter R. Steenland, Jr., Department of Justice, Environment and Natural Resources Division, Washington, D.C., Kevin M. Blake, Federal Aviation Administration, Jamaica, NY, of counsel), *for Federal Respondents.*

CAROL L. VAN SCOYOC, Assistant County Attorney for Westchester County, White Plains, NY (Marilyn J. Slaatten, Westchester County Attorney, Kenneth E. Powell, Deputy County Attorney for Westchester County, White Plains, NY, of counsel), *for Westchester County Respondents*.

Per Curiam:

These are petitions for review pursuant to 49 U.S.C. § 1486 of two orders of the Federal Aviation Administration (FAA), which (1) issued a Record of Decision (ROD) and a Finding of No Significant Impact (FONSI), thereby approving various proposed projects at the Westchester County Airport (Airport), and (2) approved the Airport Layout Plan, a map reflecting the proposed projects.

The petitions for review are denied.

We do not agree with petitioners that the FAA's actions are not ripe for review because funding for the Airport project is uncertain. Whether an agency action is ripe for review requires an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). This case is fit for resolution because there is nothing else for the FAA to do in evaluating the environmental impact of the Airport project. Funding for the project is a completely separate question. *See Township of Parsippany-Troy Hills* v. *Costle*, 503 F.Supp.

314, 319 (D.N.J. 1979), *aff'd*, 639 F.2d 776 (3d Cir. 1980). Further, withholding a decision at this point would create a hardship for Westchester County because uncertainty surrounding the fate of the project may affect the County's ability to secure funding.

Petitioners claim that the FAA violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, by failing to circulate for public comment its independent analysis of the likelihood that a new terminal will result in increased Airport use. This claim is without merit. While NEPA and the regulations promulgated under it encourage public involvement in the preparation of environmental assessments, *see, e.g.*, 40 C.F.R. § 1501.4 (1989); FAA Order 5050.4A § 18(a); *see also Hanly* v. *Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), the FAA more than complied with this requirement. The FAA and Westchester County conducted public hearings and received written comments on every draft environmental assessment; the FAA circulated for comment its Preliminary Analysis of the environmental assessment; and the FAA's independent analysis itself was done in response to comments of petitioners. NEPA requires no more.

Petitioners' contention that the required state and local review process never took place is similarly unpersuasive. The record indicates that Westchester County sent the draft environmental assessment/generic environmental impact statement to the New York State Planning and Development Clearinghouse, which is New York's "single point of contact." *See* FAA Order 5050.4A § 48. In addition, it is clear that local governments in the area of the Airport and concerned citizens

were given several opportunities to review and comment on the project.

Petitioners' challenges to the merits of the FAA's decision also are unavailing. We review the FAA's decision that a full environmental impact statement is not required for the Airport project under the arbitrary or capricious standard of 5 U.S.C. § 706. *See Hanly*, 471 F.2d at 828-30. In practical terms, our task is to determine whether the FAA has taken a "hard look" at the potential environmental consequences and has convincingly documented its decision. *Town of Orangetown* v. *Gorsuch*, 718 F.2d 29, 34-35 (2d Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984). We are satisfied that the FAA has done so.

Petitioners' argument that the FAA acted arbitrarily and capriciously in this case is entirely without merit. The FAA gave adequate consideration to the cumulative impact of the Airport project, the public controversy surrounding it and available alternatives. *See* 40 C.F.R. § 1508.7 (1989); *id.* § 1508.27(4); FAA Order 5050.4A § 47. Although the FAA declined in its FONSI to express any view on the cumulative impact of the Postal Service facility that may be built on Airport land, the FAA examined this facility in some detail in its Preliminary Assessment. That the FAA considered public controversy is obvious: the Airport project is categorically excluded from environmental review, *see* FAA Order 5050.4A §§ 20(b), 23(a)(4), but the FAA decided to prepare an environmental assessment in view of the community opposition to the project. The FAA's consideration of alternatives in the environmental assessment/environmental impact statement and in the ROD and FONSI is adequate given its valid finding of

no significant impact. *See City of New York* v. *United States Dep't of Transp.*, 715 F.2d 732, 744 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

The petitions for review are denied.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
EASTERN REGION

RECORD OF DECISION

NEW PASSENGER TERMINAL
ASSOCIATED DEVELOPMENT AND OTHER
AIRFIELD IMPROVEMENTS
WESTCHESTER COUNTY AIRPORT
WHITE PLAINS, NEW YORK

The Proposed Action is to increase the safety, efficiency and utility of Westchester County Airport (HPN) by providing users with a new passenger terminal; associated roadways and parking; a new parallel taxiway with additional connections, exits and holding aprons; new areas for fixed based operators; new corporate hangars and offices and associated roadways and parking; an approach lighting system for Runway 34; and other development.

It is clear from data and correspondence that has evolved during the environmental review process that a new and larger passenger terminal is needed at HPN. The overcrowding and occupant safety and security aspects of the old terminal warrant a new terminal at this time.

The Federal Aviation Administration (FAA) recognizes the community concerns that a larger terminal and associated development will cause HPN to expand into a major air carrier facility, a "LaGuardia North". HPN, however, has limited markets, and therefore limited demand, by virtue of its limited runway length. The development of these markets is also limited by the closeness of LaGuardia Airport, about 20 miles south, which has better and more frequent commercial service. For airspace reasons, its closeness also causes it to suffer delays equivalent to the NY metropolitan airports in adverse weather conditions. The FAA's independent forecast of activity (attached) indicates that HPN will remain predominantly a General Aviation airport with limited commercial service operations. The existing physical constraints to accommodation of forecast

commercial service demand such as the existing terminal building, ramp space and aircraft parking would affect demand accommodation to a limited degree because some local residents who would choose the airport over LaGuardia would be turned away by the uncomfortable and crowded terminal. However, this would be a very small number of passengers and would have a minimal effect on the total number of passengers or number of operations because the demand is such that it can be accommodated with existing facilities by shifting some demand to adjacent hours. Therefore, the bulk of the demand is expected to be accommodated with or without the proposed improvements.

To further respond to community concern relating to expanded airline activity at HPN, FAA is requiring that any proposed future airport action that has the potential to increase demand or to change demand accommodation such as: longer/stronger runways; additional aircraft gate positions; increased terminal ramp strength and capacity; or a deviation from FAA dimensional standards to allow for larger aircraft, will be subject to appropriate environmental analysis under NEPA prior to FAA approval. The FAA has included a condition of approval requiring the County to obtain FAA approval in the event they intend to pursue any of these types of actions.

Commentors expressed concern that the proposed development will increase the capacity of the airport, which is contrary to existing airport policy. FAA recognizes that some minor theoretical capacity increases are unavoidable by certain of the Proposed Action items. However, the majority of them have minimal relation to airport capacity in terms of increasing the total number of annual operations. Overall, the items improve the efficiency of operations thereby reducing on-airport delays and the impacts associated with such delays.

There are a number of different elements of Federal action presented for a decision by this terminal development and other airfield improvement projects. These include actions which will increase the efficiency of air traffic operations and improve safety of aircraft operating at Westchester County Airport. For example, the proposed taxiways and holding aprons will decrease

Air Traffic workload and delays and the perimeter road will enhance safety. The control of parcels of land in and around the airport will allow for sight clearance from the tower and will increase safety. The Approach Lighting System would improve the operational reliability of aircraft during approach and landing operations and would aid controllers in the performance of their duties by reducing arriving aircraft go-arounds and/or diversions to other airports during low visibility weather conditions. The larger terminal will eliminate overcrowding and enhance airport security. This action also constitutes a decision which allows future approval of any grant funds which may be provided to the Sponsor.

The final environmental documents, as supplemented by FAA's independent forecast report dated October 1, 1989, satisfies the requirements of the National Environmental Policy Act (NEPA) of 1969, the Airport and Airway Improvement Act, as amended, and FAA Orders 1050.1D and 5050.4A.

While some segments of the Westchester/Putnam/Fairfield service area have indicated support for this development project, other portions of the area have raised strong objections. There is firm opposition to this development project by some local residents and municipalities that are currently impacted by aircraft noise or simply oppose expansion.

The FAA is fully aware of the presence of local opposition to this project. The organizations and individuals involved have presented their views with respect to this proposed project, and their recommendations with respect to alternatives. Of prime concern is terminal size and its affect on future airport activity. In response to this controversy, this entire project, which includes items normally categorically excluded from the requirement for formal environmental assessment, was subjected to intense review including several revisions to the environmental document, extensive internal review and distribution of a preliminary FAA evaluation report. These are steps not associated with items generally categorically excluded or even with the processing of a Finding of No Significant Impact.

FAA's independent forecast provides a reasonable basis for estimating conditions both with and without the Proposed Action. A traveler's decision to use a particular airport is affected principally by flight availability to a final destination and return flights, and only to a small degree on conditions in the terminal area. As such, it is not expected that air travel demand at HPN will vary greatly with or without the proposed development. This is consistent with the purpose of the Proposed Action, which is to improve the level of service and the safe and comfortable accommodation of passenger activity in the terminal, and to better integrate airside and landside activity at HPN rather than to generate increased air passenger demand at HPN.

While the FAA is not in a position to control or direct the actions and decisions of the Sponsor, the FAA does have the ability to withhold project approval and associated Federal funds. It was from this perspective that the FAA conducted an independent analysis of forecast demand and operational needs at HPN in order to evaluate and compare the potential impacts and to discern whether there was an alternative so clearly and unequivocally superior to that proposed by the Sponsor or whether the Sponsor's proposal would cause impacts so severe as to warrant FAA action to disapprove and withhold federal funds for the project proposed by the Sponsor. In such circumstances, the FAA would try to influence the Sponsor to accept any alternative shown to be so clearly superior to its proposal.

The facts do not warrant such actions by the FAA. The FAA accepts and supports the alternative preferred by the Sponsor, the Proposed Action. As noted, the Proposed Action development items will increase the safety and efficiency of passenger and aircraft movements at Westchester County Airport and will not cause any significant environmental impacts to the surrounding area as evident from the FAA's Finding of No Significant Impact.

FAA recognizes its environmental responsibility under the NEPA, CEQ regulations, and its own directives. The FAA also has the responsibility to enhance, develop and improve the safety,

efficiency, and utility of the national air transportation system, including the airport development needed to achieve these goals. The FAA actions involved in the implementation of the airport sponsor's development plan include the following:

A. The FAA must make a determination under 14 CFR Part 157 [(49 U.S.C. 1354(a)] as to whether or not it objects to the Proposed Action items of development from an airspace perspective, based upon aeronautical studies.

B. Pursuant to 49 U.S.C. 1348(b), the FAA must, in support of the above described airspace actions, continue to operate a wide range of existing air navigation facilities, to replace an existing radar facility and to install an approach lighting system.

C. Also important for this project to proceed, will be an FAA decision to provide financial support for eligible airport development projects, through the Federal grant-in-aid program (49 U.S.C. App. 2201 et. seq.).

D. Other agency decisions necessary for this project to proceed to completion, which involve the FAA's Airports program, include airport certification (see 49 U.S.C. 1432, 14 CFR Part 139), airport layout plan approval (see Airport and Airway Improvement Act 79, 49 U.S.C. 2210(15), and environmental approval (see 42 U.S.C. 4321 et. seq. and 40 CFT 1500 et. seq.).

Recognizing these responsibilities, we have carefully considered these objectives in relation to aeronautical and environmental factors at Westchester County Airport and utilized the environmental process to make a more informed decision. (See attached Memoranda from the affected FAA operating divisions, which become part of this Decision including all required mitigation measures contained therein.)

Having carefully considered the aviation safety and operational objectives of the proposed project, as well as being properly advised as to the anticipated environmental impacts of the

proposal, under the authority delegated to me by the Administrator of the FAA, I find that the project is reasonably supported, and I, therefore, direct that action be taken to carry out the agency actions noted above.

/s/ Daniel J. Peterson	November 30, 1989
Daniel J. Peterson Regional Administrator	Date

These decisions, including any subsequent actions approving an Airport Layout Plan and/or a grant for Federal Funds to the County of Westchester, are taken pursuant to 49 U.S.C. 1301 et. seq. and 49 U.S.C. App. 2201 et. seq., and constitute orders of the Administrator which are subject to review by the courts of appeals of the United States in accordance with the provisions of Section 1006 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1486.

WESTCHESTER COUNTY AIRPORT (HPN)

The following 14 major facilities proposed for the airport are described here and are located by number on Figure S.1.

1. A new passenger terminal at the general location of the existing terminal building.

2. Relocated access roadways and parking for the new terminal, and reconstruction of the Rye Lake Road/Airport Access Road intersection.

3. An area at the North end of the airport reserved for highway or parking purposes.

4. A new automobile service station at Airport Access Road and New King Street, replacing the existing service station near the entrance of the airport parking lot

5. A new parallel taxiway on the west side of Runway 16-34, additional taxiway connections and exit taxiways, and additional aircraft holding aprons near the ends of runways.

6. Development of new areas for fixed base operators (FBO's), primarily to serve light general aviation aircraft.

7. New corporate hangars and offices at two locations on the airport, with access roads and automobile parking.

8. Extension of the aircraft parking apron in front of Hangar E, and aprons for the new corporate hangars.

9. An additional engine maintenance runup pad near the center of the airport.

10. A heated garage for airport maintenance vehicles, approximately 10,000 sq. ft.

11. A new Crash-Fire-Rescue (CFR) training facility at the location of the existing training facility, near the airport maintenance garage.

12. An approach lighting system for Runway 34.

13. An airport perimeter road.

14. Control of parcels of land adjacent to the airport for runway end clear zones, approach lighting, sight clearance from the tower, and storm water runoff retention.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

FINDING OF NO SIGNIFICANT IMPACT

LOCATION

Westchester County Airport (HPN)
White Plains, New York

PROPOSED FEDERAL ACTION

Federal Aviation Administration (FAA) actions involved in the implementation of the airport sponsor's development plan include the following:

A. The FAA must make a determination under 14 CFR Part 157 [(49 U.S.C. 1354(a)] as to whether or not it objects to the Proposed Action items of development from an airspace perspective, based upon aeronautical studies.

B. Pursuant to 49 U.S.C. 1348(b), the FAA must, in support of the above described airspace actions, continue to operate a wide range of existing air navigation facilities, to replace an existing radar facility and to install an approach lighting system.

C. Also important for this project to proceed, will be an FAA decision to provide financial support for eligible airport development projects, through the Federal grant-in-aid program (49 U.S.C. App. 2201 et. seq.).

D. Other agency decisions necessary for this project to proceed to completion, which involve the FAA's Airports program, include airport certification (see 49 U.S.C. 1432, 14 CFR Part 139), airport layout plan approval (see 49 U.S.C. 2210(a) (15), and environmental approval (see 42 U.S.C. 4321 et. seq. and 40 CFT 1500 et. seq.).

The Sponsor, the Westchester County Department of Public Works, has proposed the following fourteen (14) items of development (see attached numbered item drawing) herein referred to as the Proposed Action items:

1. A new passenger terminal at the general location of the existing terminal building.

2. Relocated access roadways and parking for the new terminal, and reconstruction of the Rye Lake Road/Airport Access Road intersection.

3. An area at the North end of the airport reserved for highway or parking purposes.

4. A new automobile service station at Airport Access Road and New King Street, replacing the existing service station near the entrance of the airport parking lot

5. A new parallel taxiway on the west side of Runway 16-34, additional taxiway connections and exit taxiways, and additional aircraft holding aprons near the ends of runways.

6. Development of new areas for fixed base operators (FBO's), primarily to serve light general aviation aircraft.

7. New corporate hangars and offices at two locations on the airport, with access roads and automobile parking.

8. Extension of the aircraft parking apron in front of Hangar E, and aprons for the new corporate hangars.

9. An additional engine maintenance runup pad near the center of the airport.

10. A heated garage for airport maintenance vehicles, approximately 10,000 sq. ft.

11. A new Crash-Fire-Rescue (CFR) training facility at the location of the existing training facility, near the airport maintenance garage.

12. An approach lighting system for Runway 34.

13. An airport perimeter road.

14. Control of parcels of land adjacent to the airport for runway end clear zones, approach lighting, sight clearance from the tower, and storm water runoff retention.

PURPOSE AND NEED

The Westchester County Department of Public Works, as Sponsor, desires to provide facility modifications and modernization to improve safety, increase efficiency, upgrade facilities or provide better conditions for airport users, tenants, passengers and neighbors.

The Airport's passenger terminal, dating from the 1940's, serving air carriers, commuter airlines and transient general aviation, is considered obsolete in design and inadequate in size. It has a total floor area of about 10,000 sq. ft. and its facilities are severely crowded during several hours of an average day.

Public parking near the terminal is available for approximately 700 cars, but these parking areas also serve corporate and FBO hangars. Like the terminal, the parking facilities are routinely overcrowded and promote illegal parking.

Former Runway 5-23 is now used as a taxiway. Its center section has been narrowed and repaved. The provision of additional parallel taxiways and connections would improve safety margins and increase the efficiency of the existing runway system. An aircraft holding apron now exists at the Runway 16 end, but additional holding aprons are needed to serve the other runways. Aircraft holding aprons are needed to provide: an area, clear of taxiing traffic, for aircraft to stand while the "before-takeoff-checklist" review is performed; to await final air traffic control clearance, and to permit those airplanes which have clearance to move to the runway takeoff position.

Development of new areas for general aviation hangars and FBO facilities are needed to accommodate existing and projected

general aviation activity. The general aviation facilities currently include no individual hangars for privately-owned aircraft. The FBO's serving general aviation are housed in temporary spaces or in dilapidated buildings. Some of the apron areas used for aircraft parking have broken pavement which could cause damage to aircraft; other aircraft are parked on the grass or dirt. Many private pilots and their passengers are required to walk long distances between their automobiles and their parked aircraft, while carrying luggage or other items. There is not enough apron space and service facilities for transient general aviation aircraft.

The proposed new corporate hangars are intended to accommodate aircraft currently based at the airport. They are needed to relieve overcrowding at existing corporate facilities and at the FBO's serving corporte aircraft. They would permit the indoor storage of costly aircraft and equipment that must now be kept outdoors, exposed to the weather.

Two areas for aircraft maintenance run-ups are currently provided on the airport, along Taxiway "T". However, since aircraft using the areas need to be pointed into the wind while being run up, only one of the areas is usable at many times. Demand for the run-up areas has shown that on many occasions two pads are needed at the same time. An additional run-up area, is recommended on the taxiway between the midpoint of Runway 16-34 and Runway 11-29.

The approach lighting system is an integral part of the instrument landing system now serving Runway 34 and will provide more positive control and enhance the availability of this runway to users.

A new CFR training facility is planned at the location of the existing training facility, near the airport maintenance garage. The new facility will be designed to minimize adverse environmental impacts such as runoff or groundwater contamination by fuel or other pollutants.

The Airport lacks a complete perimeter road system. Presently, service vehicles must cross active runways to reach sections of

the airport. Crossings of an active runway is considered an unnecessary hazard.

There are areas beyond the present airport boundaries where it is recommended that the airport obtain control through fee simple purchase or easements. These include clear zones off the ends of Runways 29 and 34, and areas on the south side of the airport needed for sight clearance and water runoff retention.

BACKGROUND

An Environmental Assessment (EA) and Generic Environmental Impact Statement (GEIS) was prepared for the Westchester County Department of Public Works in February 1987, relating to the fourteen proposed action items as recommended in the Airport Master Plan Report. The EA was prepared under Federal guidelines and the GEIS under New York State Environmental Quality Review Act (SEQRA) guidelines.

In response to comments on the February 1987, EA/GEIS and in order to provide more specific information concerning development of the Terminal, a combined Draft EA under Federal guidelines and Draft EIS under State guidelines was prepared in August 1988. This August 1988 Draft EA/EIS contained more specific information on proposed action items Numbers 1 and 2 (a new passenger terminal building; associated parking structure and facilities; relocated access roadways; rental car facilities). Collectively, these proposals were called the Terminal Facilities Modernization Project by the sponsor. This August 1988 Draft EA/EIS supplements the February 1987, EA/GEIS and should be reviewed in conjunction with it.

In November 1988, three (3) additional volumes of environmental data were prepared for the proposed action, each also supplementing the February 1987 EA/GEIS. Volume I includes revised material to Chapters 1 thru 5 in the Draft EA/GEIS, along with new Appendices A thru F. Volume II includes additional material, including a description of the public hearing on the project (Chapter 6) and responses to comments submitted on the Draft EA/GEIS (Chapter 7). Volume III

contains copies of the written comments submitted on the Draft EA/GEIS (Appendix G) and a copy of the Affidavit of Publication (Appendix H).

Hence, there are five (5) volumes of data comprising the Westchester County Airport EA for the proposed action.

In response to expressed concerns of commentors and Federal Aviation Administration (FAA) inquiry, Volume II of the November 88 EA addressed the issue of what could happen if the Terminal Capacity Agreement were not in effect and if the County did not avail itself of its right to limit the capacity of the Terminal to 480 passengers per hour. The County provided a "worst case" analysis which produced peak hour figures of: 680 passengers; 4 air carrier and 8 commuter operations with 1 air carrier utilization per hour per gate and 2 commuter uses per hour per gate. The assumption that peak usage patterns would continue uniformly throughout the year on a 365 day basis produced total annual figures of: 2,074,660 passengers, 16,060 air carrier operations, and 41,680 commuter operations. This analysis was not intended to be a forecast of demand, but rather a reactive response to outside concerns (It is noted that the EA/GEIS contains, from the HPN Master Plan Update, the forecasts of airline passengers and aviation activity assuming that the Stipulation would remain in effect throughout the forecast period). Using the ramp parking constraint figures (680 pax/hr., etc.) noise (Ldn) contour areas were developed with and without the Terminal Capacity Agreement in effect for the Year 2006 and with the normal transition of quieter Stage 3 aircraft.

As a result of this information, the FAA requested the County to conduct a detailed grid point analysis in order to evaluate the degree of impact of such increases in noise over the surrounding area. The requested data was presented to the FAA in late February 1989.

On March 28, 1989, the FAA prepared a Preliminary Analysis of the Westchester County Environmental Assessment and provided the opportunity for public comment before an FAA environmental decision was to be made. The opportunity for

comment was provided as an extra step in the environmental decisionmaking process because the FAA was aware of the considerable local opposition to the project. The FAA Preliminary Analysis utilized the 680 passenger per hour figures with the one-hour and one-half hour gate turnaround times for air carrier and commuter aircraft, respectively. It also assumed that the existing terminal could accommodate the 680 passengers per hour and as such there was little difference in potential impacts when comparing the existing terminal under the "No Build" scenario with the new terminal under the "Build" scenario in the Year 2006.

Numerous letters were received commenting on the FAA's Preliminary Analysis. Several issues were presented by the commentors taking exception to the assumptions made in areas such as turnaround times, maximum number of passengers to be expected through the building, size of building, size of aircraft parking ramp and forecast of activity. FAA carefully reviewed each comment and concluded that additional evaluation was warranted. Such evaluation and conclusions are incorporated into this Finding.

BASIS OF ANALYSIS

The EA includes extensive discussion of various stipulations, agreements and policies affecting airport use and development. The Stipulation of Settlement in the Midway Case and the published County policy both suppress airport use and development. The County maintains that, as a result of these constraints, there is a finite limit to the number of annual aircraft operations that could be accommodated at the airport. They also note that there is a resulting limit on the number of aircraft as well as a limit in the type and size of aircraft that could utilize the airport.

The Midway Case and later Terminal Capacity Agreement maintain that the capacity of the terminal (existing and new) will be 480 passengers per hour. It has been the County's position that it is neither appropriate nor realistic to make forecasts which ignore the 480 passenger per hour passenger capacity limit

on either terminal usage since there is no provision in the new Terminal Capacity Agreement for terminating the agreement prior to the end of the forecast period used in the environmental studies.

The FAA concurs that the 480 passenger per hour limit must be enforced for the existing terminal to comply with fire code and safety to occupants rules and regulations. This was primarily the basis upon which the 480 number was developed. Note that the 480 per hour is not an actual instantaneous building occupancy, but rather a rate of flow that results in a building occupancy that would be within the allowable fire code occupancy limit. Hence, the so-called "No-Build" scenario cannot and must not consider a terminal capacity of more than 480 passengers per hour.

The proposed new terminal, being of larger size, will have the potential to accommodate more occupants per hour, assuming, of course, that the existing Terminal Capacity Agreement does not remain in effect for whatever reason. It is noted that a prime reason for FAA's request to the County to conduct an analysis considering potential impacts under an "unconstrained" scenario was that the FAA was not a signatory to this agreement and its limits. Recognizing that expiration of a terminal capacity limit is a possibility and that the new larger terminal could accommodate more passengers than the smaller existing building, the FAA has re-evaluated its initial assumption and concluded that the No Build and Build scenarios will not be the same during peak periods. Therefore, scenarios depicting accommodation of the potential passenger demand with and without the new terminal were needed. For purposes of this Finding, the existing terminal building will be restricted by fire code to a building occupancy of 480 passengers per hour and the proposed new terminal, although intended to be restricted to 480 passengers per hour by the County Agreements, will be analyzed using a demand forecast of passengers and operations and the ramp and new terminal building as constraints. The FAA has independently conducted such a forecast and it is explained in the following section (Activity Analysis/Forecast). A

more detailed rationale is included in the attached report, "Demand, Capacity and Operational Analysis of Westchester County Airport (HNP) Terminal Facilities Modernization Project Environmental Assessment", dated October 1, 1989.

As noted above, the FAA required the County to include in the EA an analysis of the part of the unconstrained forecast (passengers and operations) that can reasonably be expected to be accommodated at the airport in the absence of the contractural limits (Ref. Pages 7-13 thru 7-33 of November 1988 EA/FEIS, Volume II). The analysis projected 680 peak hour passengers using four (4) ramp parking position.

The FAA's independent analysis concluded that the turnaround times used in arriving at the 680 passenger per hour figure were excessive and projected that more realistic gate occupancy times would be:

Airline Aircraft (737/DC-9)

- Unload/load and full service: 45 min.
- Originating, terminating, or thru flight: 30 min.

Regional (Commuter) Aircraft

- 30 or more passengers: 30 min.
- Less than 30 passengers: 20 min.

With these new turnaround values, the new maximum number of passengers per hour that can pass through the new terminal, based on ramp parking positions/capacity would become:

Arriving passengers on large aircraft	2 × 86 = 172
Departing passengers on large aircraft	2 × 86 = 172
Enpl/depl previous or successive hour	2 × 86 = 172
Arriving passengers on commuter aircraft	4 × 42 = 168
Departing passengers on commuter aircraft	4 × 42 = 168
	Total = 852

This number should *not* be used to determine the forecast of passengers and operations that can be expected at HPN. Rather, this number should be used *only* to constrain the demand forecast as an indicator of the amount of peak hour spreading to be expected, that is, how much the daily operational profile will change to accommodate the demand. It is assumed that only when adjacent relatively convenient hours are filled, will demand suppression begin. The FAA's independent analysis was used for the forecast of activity of HPN. As developed in the attached FAA Report, the forecasted maximum number of peak hour unconstrained passengers at HPN in the Year 2006 will be about 693. The 852 passenger per hour figure is based on ramp occupancy time by users. It will only become a constraining factor if the forecast of passenger demand reached it, which it did not. Note that the predicted number of 693 is for the busiest hour of the busy day (Friday) in the peak month (July). There will be busier days, for example, holidays, during which 693 will be exceeded and 852 will likely be reached.

A forecast of aviation activity at any airport should not be based on whether a certain number of passengers (i.e., 680, 852 or 1,000) can be accommodated by a building size or number of terminal ramp parking positions. Terminal size and ramp space is normally based on the forecast of passengers/operations at an airport, not vice versa. The FAA's independent analysis presents a reasonable estimate of the passenger activity levels that can be expected at HPN and how they can be accommodated.

Hence, the basis of analysis for this Finding is the FAA independent analysis/forecast, appropriate portions of the EA, and FAA's experience and judgement in airport planning, capacity and operational matters.

WEICKER AMENDMENT

The Weicker Amendment to the DOT Fiscal 1989 Appropriations bill (H.R. 4794) directed the FAA "to undertake a comprehensive environmental assessment to determine ambient noise

levels, aircraft noise levels, appropriate noise abatement techniques, and the environmental impact of the proposed terminal, parking and road network expansion plans." A number of commentors interpreted the language in the Amendment as a requirement to conduct an Environmental Impact Statement (EIS) for the proposed HPN development. There was also some question that the Weicker Amendment required special treatment for the terminal project. The intention of the Amendment was clarified by Congressmen Silvio Conte and Hamilton Fish, Jr. in their October 27, 1988, letter to the FAA Administrator. In their letter they stated that, "The Senate report language does not require that your agency treat this enviornmental assessment any differently than it would any other environmental assessment for terminal replacement. In other words, the Senate report language is consistent with current environmental protection law."

The FAA has complied with both the letter and intent of the Amendment. The FAA's evaluation of the subject EA is considered to have gone beyond what is normally required for a project of this nature. This is evident by the FAA requiring the assessment of the terminal project without the existing passenger cap despite the County's plan to keep it in effect, and a noise grid point analysis with and without the stipulated passenger cap. Also, FAA has provided for a 30-day review period of the FAA's preliminary analysis before a final federal action choice (FONSI or EIS) was made on the proposed action which is not normally done.

ACTIVITY ANALYSIS/FORECASTS

The forecast of airline passenger and aviation activity in the Airport Master Plan and February 1987 EA/GEIS assumed that the stipulation would remain in effect throughout the forecast period, and that without the provisions of the stipulation in effect, the forecasts would be different. The FAA recognized the possibility that the provisions of the stipulation may not remain in effect. After receiving comments on the Preliminary Evaluation, which was based on a worst case approach to estimated activity by extrapolation of a capacity constraint into daily and

hourly figures which were unrealistically excessive, the FAA conducted an independent analysis of the passenger activity levels that can be expected at HPN and how they can be accommodated. (See attached Report - References to attachments refer to attachments to that Report).

The FAA's independent demand forecast of commercial service enplanements and operations (users of the terminal) was obtained by plotting historic passengers and extending the trendline - line with equal scatter of points above and below the line (See Attachment 9). Such a straight line projection implies a continually declining rate of growth. This type of forecast is believed to be appropriate given the high historic rates of growth which are due primarily to low base numbers. Unsustained high growth rates are characteristics of initial service. The projection considered that HPN service will ultimately grow at a declining rate based on two factors:

a. Capture of Westchester, Putnam and Fairfield County residents (or people from other cities who want to do business in these counties) who currently use LGA; and

b. some feeder access to the national system to and from the surrounding area small airports.

Westchester County Airport penetration of the market consisting of Putnam, Westchester and Fairfield County Residents who currently use LaGuardia will be limited by the relatively short distance to LaGuardia and the better and more frequent service provided there. Even with an aggressive campaign to compete with LaGuardia, (which is not planned) 50% penetration of Westchester/Fairfield/Putnam LGA enplanements is considered very unlikely. The attached FAA report contains an analysis of the viable markets that can be served from HPN and addresses the question of what penetration of the LaGuardia market the forecast represents (See pages 4 thru 7 of the Report).

From the plot of historic data with a trendline forecast, a conversion of operations was developed by doubling (to include both

arriving and departing passengers) the enplanements (Attachment #9) and splitting the air carrier, commuter and air taxi activity in accordance with historic data (i.e., 49.5%; 49.5%; 1.0% respectively). This yeilded the following values of forecast operations at HPN.

TABLE (INTENTIONALLY) OMITTED

Hourly operations and passengers were developed for the Year 2006 with the constraints and subsequent peak spreading into adjacent hours taken into consideration when necessary (i.e., If a particular hour is projected to have more passengers than the "480 stipulation" for the No Build condition or more hourly operations than could be accommodated by the four aircraft parking positions, the overage was allocated to an earlier or later hour or both hours). The results are tabulated as follows:

TABLE (INTENTIONALLY) OMITTED

It is concluded from the above that HPN can be expected to reach commercial service levels of about 56,618 in 2006 with or without the Stipulation, with a daily schedule/profile about as shown in the above Table. It is clear that future passengers will be even more inconvenienced and crowded with the existing terminal, with continued confusion and awkward passenger flows in the security area and other elements of the terminal. With the new terminal, little or no such problems would occur. The above figures will be used to evaluate any potential environmental impacts associated with the Proposed Action. FAA's independent forecast is in reasonable conformance with the FAA's National Terminal Area Forecast (TAF) for HPN and is attached and is made a part of this Finding.

If the Stipulation Agreement were to be ended or changed substantially, the above analysis/forecast shows that there would still be no appreciable increase in passengers per hour beyond

the 680 analyzed in the EA without future physical airport improvements and this would require FAA approval of an ALP change. In this case, additional environmental analysis would be required in compliance with the National Environmental Policy Act (NEPA). To assure that appropriate environmental consideration is given for any proposed future project having the potential for increasing the Airport's capability to accommodate more or larger aircraft, such as longer/stronger runways, additional or changed allocation of terminal parking positions (2AC and 2RA), increased terminal ramp strength and capacity, a mitigation measure is included as part of this Finding and will become part of the ALP approval. This mitigation measure states that, at HPN, any such action will be considered to constitute a need for an ALP revision requiring appropriate environmental analysis under NEPA prior to FAA approval.

IMPACT ANALYSIS

The following review is a summary of those project impact areas of concern. More detail on these and other areas can be found in the EA.

- NOTES

An aircraft noise impact evaluation was conducted for the EA. The noise evluation uses the FAA's most recent version of the Integrated Noise Model; (INM), Version 3.9.

Section 4.2.1. on Page 4-1 of Volume I to the November 1988 Supplement contains the aircraft noise evaluation of the existing (1988) conditions and future (2006) conditions with the Terminal capacity limit in place. As evident in Table 4.3 of this Section (Page 4-10), the area within the future noise contours is evaluated to be smaller than the existing contours. Although the total number of operations are greater in the future condition, average aircraft noise levels are expected to be less due to the continuing transition to quiet advanced technology aircraft. DOT/FAA Report to Congress, *Status of the U.S. Stage 2 Commercial Aircraft Fleet*, August 1989, indicates that by the Year 2005 approximately 92.5% of the U.S. airline fleet will be Stage 3 aircraft compared to approximately 40% today.

As noted above, the County was asked by the FAA to conduct a detailed grid point analysis over several noise sensitive areas to evaluate the degree of impact resulting from consideration of the elimination of the terminal capacity limit of 480 passengers per hour. The County analysis was based on a passenger per hour figure of 680 and produced total annual figures of: 2,074,660 passengers, 16,060 air carier operations, and 41,680 commuter opertions. The analysis revealed that continuation of the capacity agreement would keep the Ldn levels about 1 unit below those expected in the Year 2006 without the agreement. This is a change that would not be preceivable to most people. It must be recognized that the County's analysis provides inflated estimates of passengers and airport operations without the terminal capacity limit by assuming the same weekday activity occurs on the weekends, which is not the statistical case at HPN or most other commercial service airports.

As can be seen in the FAA's independent forecast (attached), peak hour demand activity at HPN in the Year 2006 is not expected to exceed 693 passengers per hour and that total annual air carrier and commuter operations are well below those values used as input for the noise evaluation that was conducted and produced slightly more than a 1 Ldn increase in noise.

The noise maps in the EA reflect annual operations of 11,500 air carrier plus 32,700 commuter with the terminal capacity limit in place and 16,060 air carrier plus 41,680 commuter with no terminal capacity limit in place. As can be seen in the following Table of Comparative Figures, the County's figures without the terminal capacity limit in place are in excess of the FAA demand forecast for the Year 2006. Note, again, that the County's 680 passenger per hour estimate is a limit not a forecast (as is the FAA estimate of 852 passengers per hour). The FAA's attached demand forecast is based on a reasonable projection of traffic and it has been shown that such demand can be accommodated by HPN with or without the new terminal. The data in the Table on Page 11 differs to some degree from that in the Table on Page 15, because Page 11 represents a reasonable forecast of how operations would actually occur while Page 15

is a comparison of maximums that would be unlikely to occur or would occur under very unusual circumstances.

Therefore, the noise increases reflected in the FAA's Preliminary Analysis are no longer considered a realistic projection. It is FAA's conclusion that the same traffic (9,900 air carrier plus 40,218 commuter operations) will occur in the Year 2006 whether or not the Proposed Action Items are accomplished. The noise data based on the 16,060 air carrier operations, which exceeds the demand forecast by more than 60%, does not produce any single point increase of more than 1.2 Ldn. Even though FAA's conclusion is that the proposed items will not cause any increase in operations or noise, there is always the possibility that traffic will exceed the forecast. However, even an upward revision of as much as 60%, which is highly unlikely, would not cause a significant increase in noise impacts.

The additional engine maintenance run-up pad near the center of the airport provides good accessibility and is also desirable from the point of view of minimizing noise impacts. The proposed run-up pad (as well as the existing ones) is remote from any noise-sensitive land uses in the airport vicinity.

TABLE (INTENTIONALLY) OMITTED

COMPATIBLE LAND USE

The proposed Action includes obtaining control of parcels of land adjacent to the airport. These include clear zones off the ends of Runways 29 and 34, and areas on the south side of the airport needed for sight clearance and storm water runoff retention (Reference Items 14 on the attached drawing).

Currently FAA policy on runway protection zones (formerly runway clear zones) is to resist or oppose objects or activities in the vicinity of an airport that conflict with an airport planning or design standard or recommendation. This policy is intended to protect the public's investment in the national airport system. In this regard, obtaining control of the subject

properties will provide better protection against incompatible land uses in close proximity to runway ends as well as to provide clear approaches for aircraft safety.

Some topping or removal of tall trees will be required to remove obstructions in the runway end zones and to permit visual sight clearance from the air traffic control tower. The removal of obstructions will increase safety margins, but are not expected to change the number or types of aircraft using the runways. No clear cutting is anticipated. Landscaping will be done to replace any trees removed and to maintain the aesthetic character of the area.

With the exception of a small portion of the parcel of land off the Runway 34 end (owned by State University of New York) the properties are all privately owned and do not contain any dwellings. The County has advised that they have no intention of fee simple acquisition of any of the properties, but would explore easement control for clearance/safety purposes in accordance with established procedures.

The subject lands would not be used for airport expansion or development, nor would their modification cause an increase in airport activity or capacity. All other Proposed Action items are within the airport boundary and are considered airport compatible uses.

VEHICULAR TRAFFIC

The potential noise and air pollution impacts of the proposed actions, including the new Terminal and Terminal parking, on the affected roadway network was discussed and analyzed in the EA (See Page 7-25 of February 1987 EA/GEIS; Page 5-26 of November 1988 EA/FEIS Volume I; Pages 7-75 thru 7-84 of November 1988 EA/FEIS Volume II).

As evident from the traffic analysis conducted (Ref. Pages 7-75 thru 7-84 of November 1988 EA/FEIS Volume II) for both existing and future passenger demand, airport-related vehicles are currently, and are expected to be in the future, a small

component of traffic on roads in the area of the airport. The existing roadways will be able to accommodate the additional traffic without congestion.

The EA also considers traffic conditions due to new development proposed in the vicinity of the airport (Ref. page 7-79 of November 1988 EA/FEIS Volume II). As of the writing of the EA, there were fourteen (14) new developments planned for the area surrounding the Airport. Based on traffic studies conducted for these developments, it is indicated that increases on the adjacent roadways due to other proposed development would require improvements to the roads in order to maintain acceptable levels of services. An evaluation of roadway requirements of the future traffic with the additional airport traffic was also conducted. No additional improvements would be required by the additional airport generated traffic beyond those required to accommodate the background traffic.

The backgound development in the area, which is already planned or in progress (excluding the U.S. Postal Service Facility), will, at some point, require that the Airport Road between S.R. 120 and Rye Lake Avenue be widened to four (4) lanes. The additional airport traffic, even without the terminal capacity agreement in effect, will not add to that requirement. Nor would it result in any other required changes. In the absence of the background development, the future airport traffic caused by normal growth would not create any requirement for roadway changes.

The EA analysis of future vehicular traffic without the Terminal Capacity Agreement in place used 680 peak hour passengers. As evident from the FAA's forecast the demand peak hour passengers in the Year 2006 is not expected to exceed 693 (Attachment #14B). The difference is considered minimal. As such, the forecasted level of activity are not expected to result in any significant airport vehicular traffic.

As shown on the attached drawing, the United States Postal Service (USPS) has obtained, through condemnation, airport land upon which they intend to construct a new General Mail

Facility and Vehicle Maintenance Facility. This USPS project is a wholly independent activity, totally unrelated to the Proposed Action items of development. Since the USPS project is outside of FAA control, the FAA expresses no views concerning their planned activity, environmental actions or any mitigating measures associated with any vehicular traffic impacts which may be created by the project.

It should be noted that the location of the Postal Service Facility on land adjacent to (formerly part of) the airport is merely a function of site availability not related to the airport or airport development. In fact, the Postal Service has maintained that a physcial connection from their site to the airport is not being considered. Their pursuit of non-airport related sites appears adequate to support their contention. If such a physical connection were proposed, it would require County and FAA approval and would necessarily be the subject of further environmental analysis. The Postal facility is a separate action properly addressed in a separate document which they are doing in accordance with environmental regulations.

The Westchester County Airport Proposed Action items are expected to create only minimal additional vehicular traffic beyond that which could occur without such proposed development. Therefore, there will be little cumulative impact caused by the proposed Airport actions when combined with the major off-site vehicular traffic from the USPS facility.

TERMINAL SIZE AND LOCATION

Airport terminals should be designed for a capacity to meet the projected needs of the community being served. The proposed action includes a new 41,000 sq. ft. passenger terminal at the general location of the existing Terminal (see Figure 2.1 in November 1988 EA/FEIS, Volume I). The Sponsor desires that the proposed new terminal accommodate 240 passengers per half hour, the capacity of the existing terminal. This figure agrees with the Stipulation and Terminal Capacity Agreement. Both Agreements limit passenger flows to this number.

Because the passenger limit of 240 per half-hour specified in the Stipulation could be reassessed in 1995 (due to expiration of the Terminal Capacity Agreement on January 1, 1995), the County has considered what could happen if there were no limit at all on the number of passengers who could use the new Terminal per hour (Ref. Page 7-12 on the November 1988 EA/FEIS, Volume II). The analysis used 680 peak hour passengers and justifies that the environmental effects of such unconstrained activity levels are not of a significant nature. FAA's forecast of peak hour demand passengers expected at HPN in the Year 2006 is not expected to exceed 693 (Attachment #14B). The difference is not considered significant.

A number of commentors were of the opinion that a smaller sized terminal would be adequate to accommodate forecasted passengers. As stated above, terminal size is immaterial to the demand *forecast* of passengers/operations at an airport. The Sponsor has selected the proposed terminal sie of 41,000 sq. ft. in accordance with design standards to accommodate 240 passengers per half hour, the capacity of the existing terminal, as specified in their agreements to limit passenger flows to this number. If the Stipulation Agreement were to be removed a new terminal, at 41,000 sq. ft., could realize some crowding conditions during certain times. DOT/FAA Advisory Circular 150/5360-13, *Planning and Design Considerations for Airport Terminal Building Development*, provides guidance on estimating gross terminal building area. A review of this guidance indicates that the proposed 41,000 sq. ft. terminal is on the low side of the area recommended.

An airport terminal can accommodate many more passengers than it is designed for. However, when passenger flow exceeds the design standards the results are crowding, loss of comfortable facilities and, most importantly, loss of safety in case of a fire or other emergency requiring swift exit and loss of security for aircraft and passengers because under the existing crowded conditions it becomes difficult to assure that appropriate passenger screening is accomplished.

The new HPN Terminal location will permit the continued operation of the existing quonset hut during construction and,

therefore, results in a minimum of passenger disruption. After review of the configuration of the Terminal area as depicted in the EA, it can be concluded that its configuration and location does not significantly alter the operational capabilities of the terminal apron area. Inherent in this is the fact that there will be no appreciable increase in the apron area which would allow use of aircraft that could not utilize this area now. (See below). Larger, heavier aircraft would be unable to use the airport on a regular basis due to the shortness of the main runway, the lack of runway strength, the airport's crash, fire and rescue limitations, the Airport's weight-limited, narrow taxiways, as well as FAA design standards.

TERMINAL RAMP AREA

The number of aircraft parking spaces at the proposed new terminal will be kept at four, the same number that now exists. Additionally, the sizing of the ramp will be the same as at present.

Two of the four parking positions at the terminal are for large air carrier aircraft which do not exceed the 126 ft. length limitation (due to CFR capability) and the 120,000 lb., gross weight limitation. The other two parking positions are for commuter aircraft which do not exceed 85 ft. in length.

The County's Statement of Airport Policy (no expiration date) declares, in part, that the airport's capacity, measured in terms of its capability to accept an annual number of aircraft operations, shall not be increased. Retaining the same four aircraft parking spaces is in keeping with this Policy and does not promote such an increase. The airport does not have any suitable space to stack aircraft that may be waiting to get to the ramp without interrupting airport operations. Thus, arrivals and departures of aircraft must be scheduled so as to avoid having aircraft stacked up waiting for access to the ramp. Although the FAA does not support such administratively imposed limits, this County policy is in effect by the airport owner and must be recognized.

FAA's forecast of activity at HPN in the Year 2006 does not warrant the use of larger/heavier aircraft. Such forecasted activity can be accommodated with or without the new terminal using the existing four ramp parking positions. It is the Sponsor's policy and intention to operate the airport in this manner now and in the foreseeable future.

The runway weight bearing capacity at HPN is rated at 120,000 lbs. for aircraft with dual-wheel type landing gear. Heavier, larger capacity aircraft would exceed this runway design capacity with repetitive activity. It is recognized that many airport pavements are capable of supporting limited operations with aircraft at higher gross weights than published runway strength data. However, for purposes of this assessment only aircraft in regularly scheduled service operating at the terminal ramp have been considered. This is because other aircraft can operate occasionally now and the proposed work will not affect that condition. But such use on a repetitive basis could not be reasonably accommodated due to pavement strength, ramp dimensions and ARFF/CFR capability. Furthermore, use of a parking position without a terminal gate is undesirable and generally avoided. Regular use of such apron areas by scheduled aircraft would be very unusual and is not considered a reasonable basis for long term evaluation of impacts.

Consideration of the MD-80 in the EA (Ref. Page 4-4, Table 4.1, August 1988 Draft EA/EIS) was only for purposes of calculating higher passenger loads under the speculative unconstrained forecast scenario. It should not be inferred that this aircraft will be in regularly scheduled service at HPN.

AIRPORT CAPACITY

It is recognized that some minor theoretical capacity increases are unavoidable by certain of the proposed actions. The majority of them have no relation to airport capacity in terms of increasing the total number of annual operations. The taxiway exits and hold pads theoretically increase airfield capacity in that they reduce runway occupancy times and, therefore, the

hourly capacity, but are not the type of development which would result in more annual aircraft operations. These items improve the efficiency of operations thereby reducing on airport delays and the impacts associated with such delays.

Development of new areas for general aviation hangars and Fixed Based Operator (FBO) facilities is needed to accommodate existing and projected general aviation activity in compliance with the terms of the Statement of Airport Policy. The general aviation facilities currently include no individual hangars for privately-owned aircraft. The FBOs serving general aviation are housed in temporary spaces or in dilapidated buildings. Some of the apron areas used for aircraft parking have broken pavement which could cause damage to aircraft; other aircraft are parked on the grass or dirt. Many private pilots and their passengers are required to walk for long distances between their automobiles and their parked aircraft, while carrying luggage or other items. There is not enough apron space and servicing facilities for transient general aviation aircraft.

Three areas were identified on the airport that have sufficient room and accessibility to the runway system for such uses, and where development would be consistent with the provisions of the policy. The Master Plan analysis has indicated that only two of these three areas are required for FBO facilities and general aviation hangars to accommodate future general aviation needs. Two of the areas will be reserved for use only for general aviation, and these areas are expected to satisfy all future general aviation needs. The United States Postal Service has selected one of the three areas for their mail processing activities. The area selected is part of the Item No. 6 area just Southwest of the Runway 16 end (see attached drawing). Hence, this area will not be available for general aviation needs. The wording in the ALP, "to be developed for general aviation or airport related use," was intended to provide the County with flexibility to determine which areas would be used for general aviation and which one would be available for other airport related uses. The term "airport-related use" refers to an activity consistent with the policy statement.

The designation of these areas on the ALP gives the County the flexibility to consider proposals for development of these areas, and to negotiate with potential FBOs to ensure that the policy goals regarding light general aviation are met.

The proposed new FBO and hangar areas, while providing upgraded facilities for existing general aviation users, also introduce the potential for new general aviation use of the airport. Such increase is consistent with the County's policy statement to encourage airport modernization primarily for general aviation users. Such increase is also reflected in the aviation forecasts and associated noise analysis and does not have a measurable effect on the levels of aviation activity which may create any significant environmental impacts.

An approximate 5,000 sq. ft. area was recently added to existing Hangar A at HPN, which houses an existing FBO. The attached addition consists of 2 levels at 2,500 sq. ft. each. The first floor contains a lobby, hallway, passenger lounge, supervisors office, assistant general managers office and snack bar. The second floor contains a general managers office, pilots lounge, reception area, conference room and computer room. The purpose of the addition is to improve the general aviation pilot-passenger lounge area which was previously contained in a small room on the second floor of Hangar A. The addition does not make provision for any more hangar floor area. It is an incidental item of construction to provide more comfortable quarters for FBO pilots and their passengers. The lounge does not impact the safety, utility, or efficiency of airport operations and as such does not require a formal revision to the ALP/FAA approval. The lounge provides improved and more comfortable quarters than the previous accommodations at the same location. It is not considered the type of development that results in more annual aircraft operations. Therefore, the lounge will not contribute to any adverse environmental impacts on or off the airport.

AIR QUALITY

Air quality impacts are addressed in the November 1988 EA/FEIS, Volume II (Comment No . 10, Page 7-60). Emission

inventories were developed for existing conditions, future conditions with the terminal capacity agreement in place, and the scenario of future conditions without any terminal capacity limit in place. The results show that the Proposed Action items will not increase emissions appreciably. In any case, emissions associated with aircraft, motor vehicles and fuel facilities at HPN are expected to remain a minor contributor to area-wide totals and, as such, should not interfere with pre-established plans to mitigate air pollution problems region-wide.

As shown in Table of Comparative Figures, FAA's forecast of total annual passengers and aircraft operations at HPN in the Year 2006 are well below those values used to evaluate potential air quality impacts in the final environmental document. As such, the forecasted levels of activity are not expected to result in any significant air quality impacts.

WATER QUALITY

Water quality impacts will occur due to the increase in impervious areas created by the proposed action and through land disturbance during construction.

Of the 692 total acres of land on the airport, approximately 162 acres are considered impervious and drain to Rye Lake (52 acres) and Blind Brook (110 acres). The proposed action items are expected to increase the amount of impervious surface by 124 acres with 75 acres draining to Rye Lake and 49 acres to Blind Brook.

Existing buildings and areas where petroleum products are normally handled have drains equipped with oil-water separators, which aid in preventing fuels, oils lubricants, and other petroleum products from entering the drainage system. The airport storm water discharge to Blind Brook is monitored monthly and has been in compliance with the Airport's New York State Pollutant Discharge Elimination System (SPDES) permit. Under the no-build alternative, existing conditions would continue into the future.

Under the Build Alternative, the airport drainage system would be redesigned to comply with the County's policy mandate that the airport "plan shall not be construed so as to increase existing run-off levels." To accomplish this directive, drainage techniques would be included in the design of all facilities to divert to Blind Brook the majority of surface runoff which would naturally drain towards Rye Lake. This would leave only a small portion of the airport drainage into Rye Lake. A water retention basin would be constructed in the far south area of the airport to intercept the flow of Blind Brook as it exits the airport. It would be designed to offset increases in peak runoff for all storms up to and including a 100-year storm. As with existing facilities, all new facilities where petroleum products are normally handled would have oil-water separators installed and the existing flow would continue to be monitored on a monthly basis as is required by the NYS SPDES Permit. A mitigation measure to this effect will be included as part of this Finding.

The construction of the retention basin would help ameliorate downstream flood flows to the benefit of the future PL566 Small Watershed Protection Floor Control Project planned for the Blind Brook watershed. As requested by the Westchester County Soil and Water Conservation District letter (08/29/86) and personal communication with Laura E. Tessier, District Manager, on September 24, 1986, plans for the retention basin will be submitted to the District for review during the design stage. A mitigaton measure to this effect will be included as part this Finding.

Construction of an acceptable water retention basin and use of oil water separators are expected to mitigate any potentially significant water quality impacts associated with the proposed action.

The Westchester County Joint Water Works had requested a portion of airport property to construct a water filtration plant. The plant is needed to serve the County and is unrelated to any of the subject Proposed Action Items of development. The Water

Works request was denied. As such, no water plant will be needed or will exist on airport property.

Construction impacts will be of a temporary nature and through implementation of Federal, State and local erosion and sedimentaton control procedures, no significant increase of contaminants in the groundwater is expected.

APPROACH LIGHTING SYSTEM (ALS)

The proposed ALS for Runway 34 is discussed in general in the February 1987, EA/GEIS (Comment No. 6, Page 7-11). An ALS provides a visual lighting reference for pilots of any aircraft landing on the runway, thereby providing more positive control and making landings of aircraft safer. An ALS is a visual aid, not a navigational aid. All aircraft landing at HPN can take advantage of the System.

The addition of an ALS to the existing ILS serving Runway 34 will enhance the availability of this Runway to users and can possibly lower landing minima. The effect of this improvement on an annual operational capacity would be insignificant. There would be no measurable effect on the levels of aviation activity as described in the forecasts and, therefore, no impact on the calculations of noise and air pollution based on forecasts of aircraft operations.

The potential light emission impacts associated with the ALS are also discussed in the February 1987 EA/GEIS (Page 4-8, Section 4.18). The proposed ALS would be elevated and shielded thereby eliminating any light emissions that may pose a distraction. The land use in the area of the proposed ALS is office, institutional or vacant.

AIRPORT SURVEILLANCE RADAR (ASR) -9 FACILITY

The existing ASR-8 equipment is scheduled to be upgraded to an ASR-9 in accordance with the FAA's National Program. At present the ASR-9 equipment delivery date is July 1991. The ASR-9 equipment is the latest state of the art equipment and

will enhance the radar coverage of the Westchester County airspace. The upgrading of this equipment will not provide HPN with more capacity.

In order to install the ASR-9 equipment without affecting the operations of the existing ASR-8 facility, the ASR-9 equipment will be installed in the existing Remote Transmitter Receiver (RTR) building. The RTR building is located on airport property approximately 200 ft. south of the ASR-8 facility. Prior to establishing the ASR-8 facility, the RTR building was used as a combined RTR and ASR facility. This building will be renovated and the old ASR tower foundations will be replaced. It is necessary to replace the foundations because the old foundations were for a 57 ft. tower and the ASR-9 tower will be 77 ft. The 77 ft. tower height for the ASR-9 facility is the same as the existing ASR-8 facility. However, due to ground elevations the top MSL elevation of the ASR-9 tower will be approximately 10 ft. higher than the ASR-8 tower. The 77 ft. tower height is required to eliminate the shielding effect of the trees surrounding the site. After the ASR-9 facility is commissioned the ASR-8 equipment and tower will be dismantled and shipped to some other, as yet unidentified, location.

Because of the trees surrounding the site, in general, only the upper portion of the ASR tower and antenna will be visible from areas outside the airport. Esthetically, when the ASR-8 tower is dismantled, the view from off airport will be similar to what presently exists.

Generally, ASR facilities, located on airport property, are categorically excluded from formal enviornmental analysis. This installation is a separate and independent action from those proposed in this Finding and is mentioned only as a item of future development occurring in the same general area as other proposed development.

SOCIAL/ECONOMIC IMPACTS

The project will not involve the need to relocate any residence or business; alter surface transportation patterns; divide or

disrupt established communities; disrupt orderly, planned development; or create an appreciable change in employment.

PUBLIC HEARING/RESPONSE TO COMMENTS

A Public Hearing on the Master Plan Update and Draft EA/GEIS was held at the Airport on November 13, 1986. Citizens from the area were afforded an opportunity to voice their opinion or concerns about the proposed action. The comments made in the Public Hearing and in written statements are summarized in Chapter 7 of the February 1987 EA/GEIS, along with responses. The written statements received are listed and reproduced in Appendices G and H. Also, Chapter 5 (Pg. 5-1) of the August 1988 Draft EA/EIS presents additional data in order to be more responsive to the comments received on the February 1987 EA/GEIS.

A second Public Hearing was held at the airport, on October 4, 1988. This hearing addressed the Terminal Facilities portion of the proposed action. The relevant statements made at the hearing, and the relevant written comments submitted thereafter, are summarized in Chapter 7 of the November 1988 EA/FEIS (Volume II), along with responses. Copies of the written comments submitted on the August 1988 Draft EA/EIS are reproduced in Volume III on the November 1988 EA/FEIS.

As stated in the *Background*, FAA had provided a 30-day opportunity for public comment on a Preliminary Analysis of the Sponsor's environmental document. Numerous letters of comment were received, several of which provided information which warranted additional evaluation by the FAA. The results of such evaluation and response to comments are provided by this Finding. Although this Finding does not respond to each comment individually, all were carefully considered in our evaluation.

MITIGATION MEASURES

The following measures are conditions of this Finding and will become conditions of the ALP approval and/or any federal grant for any of the proposed action items.

1. A stormwater management and erosion and sedimentation control plan will be prepared and submittted to the appropriate federal, state and local agencies for approval, outlining the timely installation and maintenance or erosion and sediment controls according to the pertinent agency's water quality standards and adhered to before, during and after the construction processs.

2. All-land clearing fugitive dust will be kept to a minimum and open burning of land clearing debris will conform to the State Air Quality regulations.

3. Construction contract specification will contain the provisions of FAA Advisory Circular 150/5370-10, Standards for Specifying Construction of Airports, (Change 10), Item p-156, Temporary Air and Water Pollution, Soil Erosion, and Siltation Control; and 150/5320-5B, Airport Drainage. Construction of any of the proposed action projects will not be permitted to begin until suitable arrangements have been made for disposal of construction debris.

4. All surface runoff will be collected and run through oil-water separators and/or other systems for recovering oil, fuel or other chemical spillages from aircraft or other sources before entering the drainage system.

5. Plans for the redesigned airport drainage system, including the water retention basin, will be submitted to the appropriate Federal, State and local agencies for approval prior to construction.

6. Before any construction begins in areas not previously developed, a State 1B survey will be performed to determine the presence or absence of historic or cultural resources. If resources are found during the survey or during any construction, the State Historic Preservation Officer will be contacted to determine the course of action.

7. Any future proposed action, such as: longer/stronger runways; additional aircraft gate positions; increased terminal

ramp strength and capacity; or a deviation from FAA dimensional standards, that has the potential for increasing the capability to accommodate more or larger aircraft. At HPN, any such action will be considered to constitute a need for an ALP revision requiring appropriate environmental analysis under NEPA prior to FAA approval.

CONCLUSION AND APPROVAL

After careful and thorough consideration of the facts contained herein, the undersigned finds that the proposed Federal action is consistent with existing national environmental policies and objectives as set forth in Section 101(a) of the National Environmental Policy Act of 1969 (NEPA) and that it will not significantly affect the quality of the human environment or otherwise include any condition requiring consultation pursuant to Section 102(2)(c) of NEPA.

APPROVED:	/s/	11/30/89
	Manager, Airports Division	Date
DISAPPROVED:	_____	_____
	Manager, Airports Division	Date

U.S. Department
of Transportation

**Federal Aviation
Administration**

Mr. Andrew O'Rourke
County Executive
Westchester County Airport
County Office Building
White Plains, New York 10601

Dear Mr. O'Rourke:

We have reviewed the updated Airport Layout Plan (ALP) for Westchester County Airport (HPN) which was submitted for approval by responsible officials from the County of Westchester on April 24, 1989.

A recommendation to approve the updated ALP was made by the Manager, Airports Division of the Eastern Region of the Federal Aviation Administration on October 10, 1989. That recommendation was endorsed and approved in the Record of Decision issued by the Regional Administrator on November 30, 1989, wherein officials of the Region were directed by the Regional Administrator to take the necessary steps to implement the decision approving the proposed airport improvements. Formal execution of the FAA's approval for this ALP would have occurred at that time, but for the fact that the State Department of Transportation had not yet completed its review of the project. However, such execution is merely agency implementation of the Regional Administrator's decision to proceed with the airport development plan, including the ALP, at that time.

Now that the updated plan has been adopted by both County and State officials, the updated ALP is hereby formally approved as contemplated by the Regional Administrator's decision and order of November 30, 1989. As indicated in the October 10 recommendation and in the Environmental Assessment, approval of the updated ALP is conditioned upon a number of mandatory mitigation measures that constitute an integral aspect of that approval. They are:

1. A stormwater management and erosion and sedimentation control plan will be prepared and submitted to the appropriate federal, state and local agencies for approval, outlining the timely installation and maintenance of erosion and sediment controls according to the pertinent agency's water quality standards and adhered to before, during and after the construction process.

2. All-land clearing fugitive dust will be kept to a minimum and open burning of land clearing debris will conform to the State Air Quality regulations.

3. Construction contract specification will contain the provisions of FAA Advisory Circular 150/5370-10, Standards for Specifying Construction of Airports, (Change 10), Item P-156, Temporary Air and Water Pollution, Soil Erosion and Siltation Control; and 150/5320-5B, Airport Drainage. Construction of any of the proposed action projects will not be permitted to begin until suitable arrangements have been made for disposal of construction debris.

4. All surface runoff will be collected and run through oil-water separators and/or other systems for recovering oil, fuel or other chemical spillages from aircraft or other sources before entering the drainage system.

5. Plans for the redesigned airport drainage system, including the water retention basin, will be submitted to the appropriate Federal, State and local agencies for approval prior to construction.

6. Before any construction begins in areas not previously developed, a State 1B survey will be performed to determine the presence or absence of historic or cultural resources. If resources are found during the survey or during any construction, the State Historic Preservation Officer will be contacted to determine the course of action.

7. Any future proposed action, such as: longer/stronger runways; additional aircraft gate position; increased

terminal ramp strength and capacity; or a deviation from FAA dimensional standards, that has the potential for increasing the capability to accommodate; more or larger aircraft. At HPN, any such action will be considered to constitute a need for an ALP revision requiring appropriate environmental analysis under NEPA prior to FAA approval.

Having executed the approval of the ALP, all steps necessary to implement the November 30, 1989 Record of Decision have been taken, other than to process applications for funding. In that regard, approval of the ALP does not in any way constitute a commitment on the part of the United States to fund the recommended development.

It remains the sponsor's responsibility to provide the requisite justification for any item of development for which federal funding is requested. Our participation, of course, will be subject to the availability of AIP funds.

Sincerely,

/s/ Robert B. Mendez

Robert B. Mendez
Manager

I CONCUR:

/s/ Daniel J. Peterson

Daniel J. Peterson
Regional Administrator FEB 28 1990

DEMAND, CAPACITY AND OPERATIONAL ANALYSIS OF WESTCHESTER COUNTY AIRPORT (HPN) TERMINAL FACILITIES MODERNIZATION PROJECT ENVIRONMENTAL ASSESSMENT

Prepared by: FAA Eastern Region
System Capacity Branch
AEA-630
October 1, 1989

A. APPROACH

The analysis was conducted in two steps as follows:

1. Review all relevant documents including:

   a. Westchester County Airport Master Plan Update, December '86.

   b. Westchester County Airport Environmental Assessment and Generic Environmental Impact Statement (5 volumes), Feb. '87; Aug. '88; Nov. '88.

   c. Sive, Paget & Riesel (S, P, & R) comments on HPN project interposed on behalf of Town of Greenwich and ACT dated October 14, 1988.

   d. FAA's preliminary Analysis of HPN Environmental Assessment dated Mar. 28, 1989.

   e. Sive, Paget & Riesel comments on HPN project dated May 5, 1989, including TAMS report.

   f. Westchester Co. letter dated June 5, 1989 to FAA (W. Handel).

   From the review provide:

a. Independent judgments for the major issues including turnaround times, maximum number of passengers that could pass through the proposed building, and other questions raised by commentors on the FAA preliminary analysis of 3/28/89.

b. Provide point-by-point answers to the comments on the FAA preliminary analysis of 3/28/89.

2. Prepare an independent forecast and determine the effect of known constraints for the no-build and build options in the year 2006.

B. ANALYSIS RESULTS

The salient points of the analysis are summarized as follows:

1. The no-build alternative should be based on 480 pax/hour which is the "capacity" of the existing building based on fire code and other safety considerations. In this regard, the no-build and "stipulation" constraint are essentially the same.

2. Both forecasts of future terminal area activity in the environmental assessment were backed into by expanding daily activity with constraints (as a worst case scenario) into annual figures. The constraints used were the stipulation that will hold passengers to 480 per hour and the other, 680 passengers per hour, as constrained by the size of the aircraft parking ramp. The FAA developed a forecast based on the trend of historical data and market potential (described below) which is a more conventional approach.

3. From review of all data, the one hour turn around times used in arriving at the 680 pax per hour appear to be excessive. More realistic gate occupancies would be:

Airline Aircraft (737/DC-9):

Unload/load & full service.....45 minutes
Originating, terminating, or thru flight..30 minutes

Regional (Commuter) Aircraft:

30+/Pax	30 minutes
Less than 30 pax	20 minutes

With these new values, the new *maximum* number of passengers per hour that could pass through the terminal based on ramp capacity and 66% load factor with maximum sized aircraft would be:

Arriving pass. on large aircraft	2 x 86 = 172
Departing pass. on large aircraft	2 x 86 = 172
* Enpl/depl previous or successive hour	2 x 86 = 172
Arriving pass. on commuter aircraft	4 x 42 = 168
Departing pass. on commuter aircraft	4 x 42 = 168
	Total = 852

* 15 minute interval before or after 45-min turn around time.

This number should be used *only* to constrain the demand forecast. The constraint will indicate the amount of peak spreading to be expected, that is, how much the daily profile would have to change to accommodate the demand that exceeds 852 PAX in an hour. Note that while the above analysis uses a 65-passenger commuter aircraft, the market does not support such a large aircraft in commuter operations. The analysis, however, describes the worst-case when all of the largest aircraft likely to be operating show up in the same hour. As described later in this analysis the expected number of *peak hour* passengers on a busy day in the peak month is 693 arriving and departing passengers, not 852.

The Environmental Assessment, did not clearly indicate that the ramp will be a constraint, since additional large aircraft could be accommodated on the adjacent aircraft apron. The airport owner, however, has indicated that the proposed terminal will be serviced only

by two airline and two commuter parking positions. The airport owner has further stated that the adjacent apron is and will continue to be used for transient general aviation aircraft parking.

4. Note that the National Plan of Integrated Airport System (NPIAS) also includes the GA runway as a capacity item accounting for the $7.0 million reference in the S,P, & R critique. See Att. #1. This runway is no longer planned by Westchester County and has been deleted from the NPIAS.

5. Atts. #2 A, B, & C are point-by-point analyses of the Sive, Paget & Riesel comments, the TAMS consultants critique and the Westchester County/FAA letter of 6/5/89.

C. Forecast of Expected Terminal Activity:

A forecast of commercial service enplanements and operations (users of the terminal) was prepared in the following steps:

- Assemble and analyze historic enplanements and operations.
- Determine 1988 monthly, day-of-the-week, and hourly relationships.
- Project unconstrained annual enplanements to the year 2006.
- Convert unconstrained projected annual enplanements to annual operations.
- Analyze LGA market penetration to assess how many point-to-point air carrier markets are viable from Westchester.
- Assess the reasonableness of the forecast based on an estimate of its penetration of the LGA market, i.e. Westchester/Putnam/Fairfield residents who currently use LGA.

- Compare the forecast prepared in this analysis to FAA's top-down (master plan modified) Terminal Area Forecast.

- Use 1988 monthly, day-of-the-week, and hourly relationships to reconstruct a busy day in the peak month of the year 2006.

- Analyze the effect of no-build and the ramp constraint on the year 2006, i.e. will it suppress the demand.

The forecast analysis follows:

1. Analysis of HPN passengers and operations are summarized as follows:

   a) Historical *Annual* Passengers, 1981 through 1988, divided into Air Carrier, Scheduled Commuter and Air Taxi, with percent of each, are given on Att. #3. These are based on final 1981-87 and preliminary 1988 Air Carrier Activity Information System (ACAIS) reports which are the most detailed and accurate information available.

   b) Historic *Annual* Operations, 1981 through 1988, divided into Air Carrier, Scheduled Commuter and Air Taxi with average passengers per operation is given on Att. #4. These were compiled from ATCT traffic counts with some modification based on information from Airport Management's landing fee records and analysis of Official Airline Guides.

   c) 1988 operations, *by month*, are given on Att. #5. These are based on ATCT traffic counts.

   d) August 1988 and July 1989 *weekly* operations showing day-of-the-week variation are on Att. #6. These are based on the Official Airline Guides for the periods shown.

e) 1988 busy-day-peak-month operations showing *hourly* variation are on Att. #7. These are based on the actual airline/commuter schedule for August 1988.

f) The 1988 monthly, weekly and hourly relationships are compiled on Att. #8, and are considered baseline relationships.

2. A forecast of Westchester County Airport enplaned passengers was obtained by plotting historic passengers and extending the trendline; meaning a line with equal scatter of points above and below the line. Such a straight line projection implies a continually declining rate of growth. This type of forecast is appropriate, given the high historic rates of growth which are associated with low base numbers. Unsustained high growth rates are characteristic of initial development of service. It should be noted that Westchester County Airport service is growing based on two factors:

a) Capture of Westchester, Putnam and Fairfield County residents (or people from other cities who want to do business in these counties) who currently use LaGuardia; and

b) Feeder access to the national system to and from the surrounding area small airports (Binghampton, Bradley, Poughkeepsie, BTV).

Although LaGuardia enplanements from the Westchester/Fairfield area have grown at an annual rate of 3.8% from 1979 through 1985, there is little historic data to establish how many Westchester/Fairfield residents would use Westchester County Airport if better service was provided. Market penetration forecasts (absent a survey) are therefore precluded and a trendline forecast is considered the most suitable method.

A plot of historic data with a trendline forecast is shown on Att. #9. This was converted to operations as shown on Att. #10. Note that projected passengers per operation from Att. #4 were used to convert forecast passengers to operations.

3. The number of viable markets that can be served from Westchester County Airport are limited based on the following:

   a) Average daily enplanements at LaGuardia from the Westchester area are:

	1979 PANYNJ Pax O & D Survey	*1985 PANYNJ Pax O & D Survey*	*1988 Estimated @ 4% incr/yr*
Westchester Co.	1614	2067	2312
Fairfield Co.	1789	2380	2662
Putnam Co.	30	47	52
Total	3433	4494	5026

   b) Note that LaGuardia enplanements from the area grew at a rate of about 4% per annum from 1979 through 1985, and 4% was therefore used to estimate 1988 enplanements from the area. Using the estimated 1988 average daily enplanements from the Westschester area at LaGuardia to hub destinations ***that are within the range of a 6548' runway***, the table below was developed. Note that Westchester County Airport penetration of LaGuardia passengers from the Westchester area is constrained by the runway length, i.e. abaility to reach more distant markets.

Destinations	*Daily Enplanements at LGA From Westchester Area to the Destination Shown*			
	% LGA	*100%*	*50%*	*25%*
Washington, (DCA/IAD)	11	552	276	138
Boston (BOS)	10	502	251	100
Chicago (ORD)	8	402	201	100
Toronto (YYZ)	4	201	100	50
Detroit (DTW)	3	150	75	38
Pittsburgh (PIT)	3	150	75	38
Charlotte (CLT)	2	100	50	25
Raleigh Durham (RDU)	2	100	50	25
Montreal (YUL)	2	100	50	25
Philadelphia (PHL)	1	50	25	13
Dayton (DAY)	1	50	25	13
Cincinnati (CVG)	1	50	25	13

The table is based on the assumption that passengers originating from the Westchester County Airport service area, have the same percentage destinations as all LaGuardia passengers indicated in column 2 above. The table is read as follows: 11% of enplanements at LGA are destined for Washington, D.C.; 5026 people per day from the Westchester area enplane at LGA; 11% of 5026 or 552 people enplane at LGA for Washington, D.C.. If HPN captured 50%, 276 people/day would enplane at HPN for Washington, D.C.; at 25%, 138 people/day.

c) Actual Westchester County Airport penetration of existing Putnam, Westchester and Fairfield County Residents who currently use LaGuardia will be limited by the relatively short distance to LaGuardia and the better and more frequent service provided there. Even with an aggressive campaign to compete with LaGuardia, (which is not planned) 50% penetration of Westchester/Fairfield/Putnam LGA enplanements *is considered very unlikely.*

d) At least 86 passengers per day are required to justify initiation of one *air carrier* flight of a 130 passenger aircraft to a new market. The division line in the table therefore, indicates a reasonable separation of the direct air carrier market from the connecting or commuter markets. As indicated, few markets are viable *even* at 50% penetration, namely Washington, D.C., Boston, Chicago and Toronto, with Detroit and Pittsburgh marginally so.

4. The question of what penetration of the LGA market the forecast represents is addressed as follows: Westchester County Airport (HPN) enplanements are expected to grow from the current 340,000 enplanements to 650,000 in the year 2006: 1) by drawing from residents who currently use LGA to the viable Westchester County Airport markets and, 2) by growth in the small airports (POU, BDL, BGM, etc.) using HPN for access to the hubs to which it is connected. If the latter is subtracted from the 310,000 growth (current to 2006) in enplanements the remainder represents penetration of the LGA market.

   An estimate of the HPN-small station market is indicated by the non-scheduled air taxi (2864 in '88 see Att. 3), plus the non-airline associated commuters (14,770 in '88, see Att. 11), plus the airline associated commuter passengers to and from small stations (estimated to be 47,450 in '88 see Att. 11). The total

small station market is estimated to have been 65,084 in 1988. At 4% growth this will double by 2006, that is it will *grow 65,000* to 130,000 enplanements. Subtracting this growth from the 310,000 and dividing by 365 gives 671 residents per day using HPN in 2006 to viable HPN markets (DCA, IAD, BOS, ORD, YYZ, DTW, PIT) that would have used LGA. When this is compared to the 2257 passengers per day ('88 increased @ 4%) that will board at LGA in 2006 to these cities a penetration of about 30% is indicated. This appears to be a reasonable figure considering that as LaGuardia reaches capacity and as airport access delays increase Westchester/Fairfield/Putnam residents will seek alternative service at their own airport.

5. The forecast 650,000 enplanements (1,300,000 passengers in and out) was compared to the TAF commercial service enplanements of 512,000 in 2000 which projected at the same TAF rate would be 592,000 enplanements in 2006. The forecast in this analysis is about 10% higher but is in reasonable conformance.

6. It should be noted that the FAA TAF (marked-up copy Att. #12) is in error for two reasons:

   a) The current TAF GA forecast is based on an old Howard, Needles, Tammen & Bergendoff (HNTB) Master Plan study *that included a GA runway* that is no longer planned; therefore, the forecast GA activity is overstated.

   b) The division of air carrier and scheduled commuter traffic count by the ATCT is based on the two and three letter airline/commuter identifiers which became confused when the commuters became associated with the major airlines. Also adding to the confusion is that commuters are operating under both FAR Part 121 and 135. As a result, while the totals of commercial operations in 1986 and 1987 are correct in the TAF, the airline/commuter

separation is in error. These were corrected in this analysis by obtaining airport management's records of commercial service landings and by reference to the OAG schedules for the years in question.

7. The effect of the "no-build" and "680 now 852 PAX/hr ramp" constraints were captured by means of a spread sheet detailing annual, monthly, day-of-the-week, and daily/hourly relationships taken from 1988 operations. A copy of the 1988 spread sheet is given on Att. #13A. Forecast 2006 operations from Att. #10 were put into the spread sheet. The resulting hourly operations and passengers are given on Att. #13B. The corresponding daily profiles are as shown on Att. #14A & B. The constraints and subsequent peak spreading into adjacent hours is indicated on Att. #14C, D, and E. For comparison purposes 1988 average day and peak day values are given on Att. #14F.

8. Note that the forecast number entered into the spread sheets is commercial service operations. The total operations number shown on the 2006 spread sheet was arrived at by maintaining the 20.4 % commercial service to total operations relationship. Although an independent General Aviation forecast could be developed, it is irrelevant, since the terminal will only be used by commercial service aircraft.

9. Note that the forecast of passengers in this analysis is constrained by the ability to reach other markets from the existing runway length.

D. **Conclusions:**

The following conclusions were made from the review and analyses:

1. The impacts of the proposed terminal should be evaluated based on a forecast of commercial service passengers and operations, rather than hourly

passenger limit or worst case scenario expanded to annual activity as was done in the preliminary analysis.

2. There are a limited number of markets that are viable for direct service from Westchester County Airport with Air Carrier aircraft.

3. The forecast developed in this analysis indicates:

   Expected passengers in 2006 can, with some peak spreading, be accommodated in the year 2006 on a ramp providing 2 commuter and 2 airline parking positions with or without the new terminal.

4. Air carrier aircraft turnaround times of 45 minutes rather than 1 hour are more realistic. This alters the maximum number of passengers that could pass through the building during peak periods. However, the limits at peak hours do not significantly affect total activity because as each peak is reached that additional demand can be accommodated in adjacent hours.

5. The "no-build" alternative and gate/ramp constraints were used only to analyze their effect on the daily profile of operations in 2006 and whether overall demand would be suppressed. Analysis indicates it would not.

List of Attachments

1. Westchester County Airport NPIAS Data Sheet

2A. Point by Point Analysis of Sive, Paget & Riesel Comments

2B. Point by Point Analysis of TAMS Report

2C. Point by Point Analysis of Westchester County Letter of 6/5/89

3. Historic Westchester County Airport Passenger Enplanements

4. Historic Westchester County Airport Commercial Service operations

5. 1988 Commercial Service Operations by Month

6. August 1988 & July 1989 Scheduled Commercial Service by Day-of-the Week

7. August 18, 1988 HPN Air Carrier & Commuter Operations By Hour

8. 1988 Baseline Relationships

9. Historic & Forecast HPN Annual Enplanements 1981 - 2006

10. HPN Forecast Commercial Service Operations 1991 - 2006

11. 1988 HPN Enplanements (ACAIS Data Base)

12. FAA Terminal Area Forecast HPN Enplanements and Operations

13A. Spread Sheet for 1988 Annual, Monthly, Weekly & Hourly Operations

13B. Spread Sheet for 2006 Annual, Monthly, Weekly & Hourly Operations

14A. Unconstrained 2006 HPN Commercial Service Busy Day Peak Month Activity

14B. Unconstrained 2006 Seats & PAX @ .66 LF Busy Day Peak Month

14C. No-Build 2006 HPN Operations & PAX @ .66 LF Busy Day Peak Month

14D. Ramp Constrained No-Build 2006 HPN Operations

14E. Ramp Constrained No-Build 2006 Average Day & Busy Day PAX

14F. 1988 Average Day & Busy Day PAX, Operations & Seats

NOTE: Att. #14E represents the no-build condition (constrained by the building and ramp) in the year 2006. Att. #14A represents the build condition in that the peak hour PAX 693 can be handled by the building and does not reach the 852 PAX/hr ramp constraint. Note also that the average day figures were developed by applying average day load factors to busy day peak month operations.

The average day PAX & operations are therefore overstated somewhat, and are not directly convertible to annual figures by multiplying by 366, the difference however is small and not considered significant.

POINT BY POINT ANALYSIS OF S. P. & R. COMMENTS

1. *S. P. & R. Pg 1:*

"The FAA's Preliminary Findings . . . is the expansion of the Terminal Facilities and aircraft parking apron . . . will not increase the number of passengers per hour or aircraft operations which would occur if the ALP was unchanged." . . . The FAA concluded (preliminarily) that the capacity and actual use of the airport will not be changed by replacement of the existing 10,000 square foot terminal with the proposed 41,000 square foot terminals — there will be 680 passengers per hour in the No-Build and 680 passengers in the Build."

FAA Analysis: Would seem to be so from Preliminary Analysis Pg. 4:

"However, it must be understood that even without the limiting agreements, the proposed facilities have a negligible effect on total air carrier operations and passengers."

Since the 480 passengers per hour was derived from the capacity of the existing building which was based primarily on fire code and other safety considerations, it is obvious that this should be the *No-Build* condition and the 680 passenger limitation based on the ramp constraint should be *the Build* condition.

Regarding the EA forecasts: Neither are demand forecasts. One is an extrapolation to annual enplanements and operations based on an owner/airline agreement limiting the new terminal to 480 pass/hour which is also the no-build condition. The other is an extrapolation based on the capacity of the gate/apron area to accommodate aircraft. An underlying assumption is that the demand is adequate to cause the constraints to be operative for considerable periods of the day, week and months. The real questions to be answered

are: (1) What is the demand for service, and (2) *if* it exceeds the capacity of the facilities, how much will be accommodated or inhibited taking into account peak spreading.

Subsequent FAA forecast and analysis indicated that demand could be accommodated build or no-build, with two air carrier and two commuter gates. While some peak spreading is necessary, overall demand accommodation is not significantly affected. The build alternative would accommodate the expected passenger peaks with some crowding while the no-build would be characterized by extreme crowding.

S. P. & R. Pg. 2:

"The FAA's conclusion is simply wrong on both ends: (1) the use of the Airport will not approach 680 passengers per hour if the ALP is not revised (the No-Build); (2) the capacity will be 1000 passengers per hour in the Build scenario, and (3) the full capacity of 1000 passengers per hour will be utilized if the proposed federal action is approved."

FAA Analysis: (1) The maximum for no-build is 480 PAX/hr for safety/building occupancy reasons; (2) FAA terminal criteria applies appropriate square feet of terminal per typical peak hour passengers which allows for under utilization initially, then accommodation of the design figure, then accommodation of more than the design number with some crowding. Whether a terminal designed for 480 PAX/hr would accommodate 680/PAX/hr or 1000 PAX/hr is a function of the level of service an airport owner wants to provide i.e. some would tolerate more overcrowding before expanding, than others. In any case, *the terminal itself*, absent the agreement, would not become a constraint at a fixed number. An approximate answer could only come from a survey of comparable airports to determine average tolerance for overcrowding; accommodation of 1000 PAX/hr, for example on Thanksgiving or other holiday weekends, is conceivable. The real question is what are the anticipated (forecast) passenger peaks.

The gate/apron constraint, which is the origin of the 680 PAX/hr in the EA/FEIS should be evaluated on the basis of the current and likely future *mix of traffic*, rather than the ability of the apron to accommodate aircraft. The 1988 annual split of commuter/air taxi to air carrier was 37, 980 to 4434 or 8.6 small aircraft to every one air carrier.

Squeezing in four or five of the largest air carrier aircraft likely to operate at the available apron space presumes a dramatic change in the aircraft mix and demand i.e. more air carrier than air taxi aircraft. The 1988 passengers per operation were 12 passengers per operation for commuter/air taxi and 53 passengers per operation for air carrier aircraft. These numbers do not suggest larger aircraft are justified, nor presage such a dramatic change in the aircraft mix. The response of putting the four aircraft onto the apron was invited by the EA/FEIS method of *backing* into a forecast by constraint.

Subsequent FAA forecast and analysis indicated unconstrained demand in the year 2006 could have a peak hour at 7-8 in the morning as follows. Air Carrier — two initiating (beginning of days flight itinerary) departures, two turn around flights and commuter — five morning initiating departures and one commuter turn around flight. These could not be accommodated on a two air carrier/two commuter ramp but could easily be spread into adjacent hours.

3. *S. P. & R. Pg. 5:*

"The FAA's conclusion is based on the following "facts":

- the turn around cycle for large aircrafts takes about one hour;

- "only two large aircraft can be unloaded at one time because larger aircraft can only use the two gates designated for them;"

FAA Analysis:

Although it varies somewhat by airport the current gate service times used in the FAA National Taxk Force studies for large (727,737,DC-9) aircraft are:

Time	*Cumulative %*
30 minutes	20%
45 minutes	80%
60 minutes	100%

Considering this and the information provided by Interair Development Corporation, Boeing and others, it would appear that it would be appropriate to use an average 45 minute turnaround time for the type of aircraft using or likely to use Westchester County Airport. Originating, terminating or through flights with minimal servicing should be provided 30 minutes gate service time. The effect of using 45 minute service times would be to increase the estimated 680 PAX/hr to 852 passengers per hour as the maximum that could pass through the building during the worst case peak.

Although the prospect of 3 or 4 air carrier at one time is not impossible (considering the stochastic nature of demand, (weather, delay, etc.), it is unlikely given the current and forecast mix of air carrier versus commuter. The airport owner has indicated that the ramp and building will be designed to accommodate two air carrier and two commuter aircraft.

4. *S. P. & R. Pg. 7:*

"In reality the new terminal will be able to process many more passengers than the 680 per hour stated in the EA. The EA asserts that the new 41,000 square foot terminal can accommodate, at a comfortable level, consistent with FAA criteria, 650-700 passengers per hour."

FAA Analysis:

A 41,000 square foot terminal can accommodate more than 480 passengers (the design number) per hour with some crowding during peaks. Terminals do operate at levels higher than their design capacities.

5. *S. P. & R. Pg. 8:*

"The capacity of the Ramp is six large, Group III aircraft at any one time, not two. Chart 5 of the TAMS Report demonstrates that six Group III aircraft can be parked on the ramp at the same time, meeting all FAA criteria."

FAA Analysis:

Neither the size of the apron, nor lack of loading bridges would limit use of the apron to two air carrier and two commuter aircraft. The airport owner has, however, indicated that the proposed terminal will be served by two airline and two commuter parking positions, and the adjacent apron is and will continue to be used for transient general aviation aircraft parking.

6. *S. P. & R. Pg. 9:*

"The following are some examples of the current turn around times for planes which terminate flights at Westchester and then are used to originate departing flights.

— Northwest Flight 1148 arrives from Detroit at 5:42 p.m. and the same DC-9 leaves as Flight 1151 for Detroit at 6:12 p.m." . . .

"The smaller commuter planes turn around even faster:

— Piedmont Flight 4401 arrives from Baltimore at 9:10 a.m. and leaves as Flight 4408 for Baltimore at 9:29 a.m. . . ."

FAA Analysis

It is hard to refute the schedule. The only offsetting comment is that actual activity does not always track the schedule.

7. *S. P. & R. Pg. 11:*

" . . . Table 5 also indicates that seven aircraft currently remain on the ground overnight, showing again that the EA and the FAA underestimate airport parking capacity. . . ."

FAA Analysis:

The environmental assessment did not specifically address the issue of airport overnight parking capacity. It is relevant to the extent that the environmental assessment should have incorporated gate time to reflect overnighting. Note that only two of the overnighting aircraft are air carrier, the remainder are commuter. Subsequent FAA analysis indicated that the effect is not significant.

8. *S. P. & R. Pg. 12 & 13:*

"Total seats per day in 1983 was 939, in 1986 the number of seats was 265 (SIC) and in 1989 the total numbers of seats was 3050. . . . The comparison between seats in 1983 and seats in 1989 is particularly striking. Not only has the absolute total increased dramatically, but the distribution of these seats has changed from almost total concentration in the morning and evening peak hours to an almost equal distribution throughout the day. This reflects the increasing use of large planes throughout the day.

FAA Analysis

The number indicated for 1986 appears to be a typo. From the referenced chart the number is more like 3100, which means it has remained virtually the same for the past 3 years. We should look at what service there was in 1983; and seats

are not people, must look at load factors. Although air carrier seats have more than doubled since 1983, passengers per operation have declined 23%. This does not appear to be a warrant for larger or more frequent air carrier flights. Positioning of aircraft for the day's flight itinerary is also a factor at Westchester County Airport.

Growth in the size of commuter aircraft is a systemwide phenomena, brought on by a decline in air carrier service commuters with the air carriers (code sharing) and public demand for better and larger aircraft. Inferences regarding demand based on the number of seats in and out are therefore of limited value. In 1988 the average number of passengers per operation of the commuters serving the airport were 13 passengers.

9. *S. P. & R. Pg. 13:*

"A large growth in demand can also be predicated for Westchester Airport due to the current market penetration both at Westchester and at the areas serviced by Westchester." . . .

FAA Analysis

From a 1978 Port Authority survey, the *average daily* passenger enplanements at LaGuardia from the Westchester area were as follows: Putnam Co. – 30, Westchester Co. – 1614, Fairfield Co. – 1789, Total 3433. From a 1985 survey the numbers are as follows: Putnam County 47, Westchester County 2067 and Fairfield County 2380, Total 4494. This indicates a growth rate of about 3.8% per annum since 1978. At this growth rate the numbers for LaGuardia in 1988 are estimated to be Putnam County 52, Westchester County 2312 and Fairfield County 2662, total 5026. The following table presents feasible destinations from Westchester County Airport, the percentage of passengers to the markets from LGA and the percentage applied to

LGA Destinations	*% LGA*	**Estimated Daily Enplanements at LGA From Westchester Area* 100%	50%	25%
Washington, D. C.	11	552	276	138
Boston	10	502	251	125
Chicago	8	402	201	100
Toronto	4	201	100	50
Detroit	3	150	75	38
Pittsburgh	3	150	75	38
Charlotte	2	100	50	25
Raleigh Durham	2	100	50	25
Montreal	2	100	50	25
Philadelphia	1	50	25	13
Dayton	1	50	25	13
Cincinnati	1	50	25	13

Assuming a 130-passenger aircraft with a 66% load factor, about 86 passengers would be required to justify one flight per day, or 172 for two flights per day. From the above table it would appear that at 25% penetration of all passsenger from the area, only 3 markets would be viable *(at one flight per day)* with 2 other markets marginally so. Even at 50% penetration only one other market is indicated. From this rather simplified analyses is it could be concluded that Westchester Co. has only a few medium-haul markets that are viable *with Air Carrier, aircraft.*

Note that one-flight-per-day service has serious shortcomings for attracting passengers, and that the viable markets for two flights/day are less. Westchester Co. Airport penetration of the market will be limited because of the more frequent and better service provided by LaGuardia.

Even if Westchester County Airport went into aggressive competition with LaGuardia (which is not planned) it could not attract all passengers from the Westchester service area who currently use LaGuardia because:

- The service to all the cities Westchester is likely to serve with air carrier aircraft (Chicago, Washington, Boston, Detroit, Pittsburgh) is better (more frequent) at LaGuardia; and the trip to LaGuardia is not excessively long.

- The Westchester Co. area does not generate enough demand to many markets that LaGuardia serves e.g. Westchester – Charleston, West Virginia, or Westchester – Greensboro, N.C. will never be feasible;

- Longer haul destinations are not feasible from Westchester due to its limited runway length (6548').

The point of this analysis is to demonstrate that Westchester County Airport has basically a commuter market with limited air carrier service to tie it into larger hubs. It will serve Westchester County residents who want access to the national system and persons wanting to travel to Westchester for business or pleasure reasons.

10. *S. P. & R. Pg. 14:*

"The Airport is serviced by major airlines: Delta, United, American, Northwest, U.S. Air, Piedmont. With increased capacity, these major carriers will undoubtedly seek to extend their service to their "hubs" not currently serviced. Chart 7 of the TAMS Report depicts new cities which are "hubs" of the carriers now operating at Westchester, within

the range of their existing flights. . . Each of these additional hub destinations are likely candidates for new direct service from Westchester to all of the major domestic air passenger markets."

FAA Analysis:

Comments regarding the potential markets indicated on TAMS Chart 7 are as follows:

- Generally speaking, the Airlines look to the market for developing the appropriate service and aircraft size to tie into their hubs. They do not necessarily tie all stations directly into their main hubs unless the market indicates such service is warranted.

- From FAA analysis Westchester to Pittsburgh may be feasible. Direct Westchester-Dayton is unlikely due to the limited market for such service. U.S. Air is more likely to tie into its major hub at Pittsburgh rather than overfly it.

- Direct Service into Raleigh Durham or Charlotte is unlikely because service points south and southwest from Westchester are already provided for, to a large degree, by the current ties into Washington D.C..

- Direct Westchester-Cincinnati service does not appear to be justified by the Westchester service area market.

Most of the major airlines mentioned are currently servicing Westchester with commuter aircraft which provide more frequent service than would air carrier aircraft. The market does not suggest a major change.

11. *S. P. & R. Pg. 14:*

"An increase in demand and a resulting growth in number of operations can also be surmised from the fact that the airlines using Westchester Airport are currently replacing their fleet composition with larger aircraft. . . .

FAA Analysis:

Introduction of larger aircraft is ordinarily justified by larger load factors which are not indicated by the historical market demand. If larger aircraft are used operations would decrease not increase. The use of slightly larger aircraft is more likely in the regional airline (commuter) operations because of the systemwide growth of this segment of this industry.

Given the historic small numbers of passengers per operation, the airlines are likely to continue to serve Westchester with the newer smaller aircraft in its current fleet and future fleets.

12. *S. P. & R. Pg. 15:*

"According to the National Plan, the FAA will be spending approximately $7,000,000 to increase the capacity of Westchester Airport. The National Plan also predicts a total of 318,000 operations by 2000, illustrating again a marked understatement in the EA's estimate of only 280,000 operations." . . .

FAA Analysis:

The $7 million is for a General Aviation runway that is no longer planned. The 318,000 operations by 2000 is from a previous MP study that included the GA runway with its anticipated increase in GA operations. This development will be removed from the NPIAS.

13. *S. P. & R. Pg. 16:*

"The opposition to this project has been thoughtful and responsible. It is based primarily on the undeniable increase in large aircraft operations and traffic which the proposed ALP and Terminal Facility will generate, transforming Westchester Airport into a major reliever for LaGuardia and feeder into the major airlines eastern hubs.

FAA Analysis:

Westchester County is a corporate/business *General Aviation reliever* for NY. It accommodates corporate/business GA aircraft that *might* otherwise want to use LaGuardia. It relieves LaGuardia of passengers only to a very limited degree in certain select markets *by accommodating its own residents,* who currently use LaGuardia.

POINT BY POINT ANALYSIS OF TAMS, 5/4/89 ANALYSIS

Note that the S, P & R report drew heavily on the TAMS report, so to avoid redundancy, only *new* issues in the TAMS report will be addressed

1. *TAMS Report Pg. 2:*

   "The assessment states that passenger traffic, estimated at 680 per hour, requires a minimum of 41,000 sq. ft. of terminal space.

   The use of a 10,000 sq. ft. facility and growing demand for air service will undoubtedly result in complete saturation of the terminal complex long before the traffic will reach 680 passengers per hour and long before the total passenger increase from 400,000 in 1985 to 1,647,000 in 2006 is attained. Therefore, it appears to be physically impossible for there to be traffic at the rate of 680 passengers per hour in the existing no build condition.

   FAA Analysis:

   The existing building capacity based on fire code and safety is 480 PAX per hour. This therefore is the no-build condition. The new building is designed to accommodate 480 passengers per hour comfortably. It would be constrained to no more than 850 passengers per hour by this 2 air carrier/2 commuter gate ramp. Demand analysis indicates, however, that no more than 693 passengers per hour are expected in the peak hour on the busiest day of the week in the peak month in 2006.

2. *TAMS Report Pg 2 & 3:*

   "The new terminal building is capable of accommodating, at a comfortable level, consistent with FAA criteria, 650-700 passengers per hour. See Chart 1. As stated in the analysis, terminals do operate at a much higher level than their design capacity. A peak capacity of 1000 passengers per hour would not be intolerable."

FAA Analysis:

A peak capacity of 1000 passengers could probably be accommodated with some crowding, i.e. would not be intolerable. Demand analysis indicates that such levels would occur infrequently.

3. *TAMS Report Pg. 4*

The ramp is capable of accommodating six Group III aircraft at one time.

FAA Analysis:

Agreed, but currently there are only 7 air carrier arrivals adn 7 air carrier departures per day. According to FAA analysis the market does not anticipate the number of air carrier aircraft shown on Chart 5 of the TAM's report; that is, 6 air carrier at a time. Additionally the County only plans two air carrier and two commuter gates

4. *TAMs Report Pg. 4:*

"Ramp capacity is also determined by turn-around time. The analysis indicates that turn around time is estimated at one hour. Table 5 depicts the scheduled arrival and departure times for May 1989 traffic. Analysis of this data indicates an average turn around time of less than 30 minutes with only one flight of the 66 arrivals exceeding one hour. Seven aircraft remain overnight. Consequently ramp capacity is greater than stated."

FAA Analysis:

A 45 minute turn around time for 737 (DC-9 aircraft, and a gate occupancy time of 30 minutes for morning originating and evening terminating (RON's), and through flights with minimal servicing is appropriate for air carrier (B737/DC-9) aircraft at Westchester.

5. *TAMs Report Pg. 4*

Growth is also determined by market penetration.

FAA Analysis:

The market to be penetrated is the people who live in Westchester Airport's service are who currently using LaGuardia. FAA analysis indicates that the number of markets and penetration is limited.

COMMENTS INTERPOSED ON BEHALF OF

THE TOWN OF GREENWICH, CONNECTICUT

AND

AIR CONSERVATION TRUST, INC.

ON

WESTCHESTER COUNTY AIRPORT TERMINAL FACILITIES

MODERNIZATION PROJECT

ENVIRONMENTAL ASSESSMENT

AND

FINAL ENVIRONMENTAL IMPACT STATEMENT

SIVE, PAGET & RIESEL, P.C.
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COMMENTS ON WESTCHESTER COUNTY AIRPORT TERMINAL FACILITIES MODERNIZATION PROJECT ENVIRONMENTAL ASSESSMENT AND FINAL ENVIRONMENTAL IMPACT STATEMENT ON BEHALF OF THE TOWN OF GREENWICH, CONNECTICUT AND AIR CONSERVATION TRUST, INC.

INTRODUCTION

The comments contained herein are submitted on behalf of The Town of Greenwich, Connecticut and on behalf of Air Conservation Trust, Inc., for the proposed Westchester County Airport Terminal Facilities Modernization Project. The Environmental Assessment and Final Environmental Impact Statement ("FEIS") like the Draft Environmental assessment and Draft Generic Environmental Impact Statement ("DEIS") for this project, was prepared pursuant to FAA Order 5050.4A, "FAA Airport Environmental Handbook", to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 *et seq.* and the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law, Aritcle 8.

The Town and the Trust's comments on the DEIS demonstrated critical omissions and deficiencies. Indeed, those inadequacies were so severe and so acute that only the preparation and circulation of a new DEIS could have achieved compliance with the FAA regulations and with NEPA and SEQRA. Rather than comply with these legal requirements, the County determined to prepare an FEIS which could purportedly cure those omissions and flaws. Such failings, however, cannot be cured by publishing even an adequate FEIS. SEQRA and governing case law require the preparation and circulation of a new DEIS or, at the very minimum, a supplemental impact statement.

The FEIS contains substantial amounts of new information including a new study on the most important area of the proposal, namely the capacity of the proposed terminal facility. The inclusion of this information into a FEIS particularly in light

of the abbreviated time frame for public review[1], also requires supplementation.

Moreover, even with its new information the newly devised FEIS is seriously deficient in important aspects, and falls far short of taking the requisite "hard look" at project impacts and alternatives. The document is non-responsive to the most serious comments regarding capacity, financing and alternatives. Rather than respond, it provides elliptical references and ambiguous information designed to obfuscate rather than inform.

The approach is particularly evident in the responses regarding capacity, segmentation, alternatives and financing. The County adheres in the FEIS in its adamant refusal to address the fact the 1987 EA/GEIS provided assurances that an environmental review would consider the project as a whole before any decisions were to be made on federal funding or grants for the various elements. EA/GEIS pp. 7-1 to 7-4; EA p. 5-3. The FEIS, however, stubbornly refuses to acknowledge that the project must be considered as a whole and instead incorrectly asserts that the County need only conduct a site specific environmental review. In similar fashion, the FEIS side steps and does not respond to comments addressing the fact that the airport capacity agreement is not enforceable by the County as it has not been approved by the FAA. Moreover, the FEIS does not address the fact that the Capacity Agreement expires in 1994. Although an additional capacity study was included in the FEIS which purports to address, in the absence of any limiting agreements, the

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[1] The Town and the Trust submit these comments, yet they object to the inadequate time period granted to review the document. Under the SEQRA regulations there must be at least a ten day period for public and agency comment and review, 6 NYCRR §617.9. The FEA, however, was not available until December 1 and many interested parties had not received the FEA by as late as December 8, 1988. As a matter of law, the ten day time period cannot commence to run until the FEA had been made generally available thereby affording the public the opportunity to review the document prior to expiration of the comment period. The Town and the Trust have submitted a letter of protest to Westchester County objecting to the abbreviated time frame for public review requiring submission of all comments by December 9, 1988. (A copy of this letter of protest is annexed hereto as Exhibit "A").

projected level of passengers and operations, this study is not included as part of the FEIS' analysis or consideration of environmental impacts. Thus, the FEIS's consideration of impacts continues to be limited by the DEIS's false assumption that the Capacity Agreement will restrain the level of operations at the Airport far into the future.

AIRPORT CAPACITY

The FEIS responds to only one of the comments concerning airport capacity raised by Greenwich and the Trust. The one response is in the form of a purported study, never before presented to the public and not included in the DEIS. The FEIS ignores all of the other related comments without explanation. The result is an FEIS which is fatally flawed and does not even approach the requisite legal standard of public discussion which is required by SEQRA.

The sole response to the comments on this issue is a "consultant's study" of the airport capacity under "unconstrained" conditions, the absence of the Terminal Capacity Agreement. This study is apparently contained in response to comment 3C in Volume II of the FEIS. However, the "study" is interspersed with the narrative of the response and is identified by quotation marks. No explanation of this is provided and it is not clear if the complete study is included in the response. This highly unorthodox means of providing substantive new information does not allow meaningful analysis since only excerpts are being provided and an attempt is being made to hide the complete report.

The study itself is presented in such a confusing manner in a jumble of qualification, myriad tables and inconsistent narrative that it is almost impossible to decipher. The presentation of such a large amount of new data in an FEIS is inappropriate and is the prime reason that SEIS's are required.

In the extremely abbreviated comment period provided by the county, it is impossible for interested and involved parties to undertake the careful analysis that is required. This is especially true in light of the fact that as late as December 7, 1988

there were insufficient copies of the FEIS available to the public to allow the detailed review which is required.

It is important to note that we requested additional time to comment, in light of SEQRA's ten-day comment period and the delay on distribution which reduced that time for two or three days. This request was denied and we were informed that any comments submitted after the two or three day effective comment period would not be considered in preparation of the Findings and Conclusions required by SEQRA.

Due to these significant constraints on our ability to review the report, we cannot comment fully on its accuracy or thoroughness. We do note, however, that no references are provided for the majority of the assumptions made in the statistical analysis, thus questioning the overall credibility of the study itself. Nevertheless, we offer the following comment, necessarily abbreviated for the reasons just discussed:

1. *Location of Terminal* – The FEIS reiterates the incorrect allegations that the new facilities are located on the same site as the existing facilities. (FEIS at 7-7). This is simply not true. The Terminal has been moved 100 feet further back. The relocation of the Terminal expands the apron and the area where planes can park, awaiting movement to the Terminal itself, which allows the parking of six 737-size aircraft at and around the Terminal. (See IPM - Babarovic and our comments on DEIS.)

The FEIS persists in stating that there will be room for only two aircraft *at the Terminal*. That is not the point. White it is true that only two aircraft can be parked so that they are attached *at the Terminal*, the relocation of the Terminal provides apron parking for four additional aircraft. Thus, these additional aircraft could be lined up for peak hour use and then be moved to the Terminal itself to load or unload passengers. This allows a significant increase in the ability to process passengers through the Terminal.

Moreover, the placement of the proposed new parking facility in the hillside – requiring additional costs and disruption of

the physical environment — would not be required if the Terminal was not relocated 100 feet further back.

2. *Misrepresentations of the Midway Decision* — The FEIS repeatedly states that the decision in the *Midway* case establishes an uncontestable right of the County to limit the use of the airport regardless of its configuration and facilities and the actual capacity.[2] The *Midway* decision does no such thing. A preliminary injunction was denied on the grounds that the County could prepare a study of the actual capacity of the airport facilities, including the Terminal and *reasonably* limit airport use based on the *facilities in existence at the time*. The decision nowhere stated that the County could arbitrarily limit use or access to the airport by the air lines to a level below that of the actual capacity. Indeed, the decision specifically states that any limitation on access and use must be reasonable and not arbitrary and must be based on the actual capacity of the facility.

The proposal for the new Terminal facilities, the modifications to the taxiways and holding areas, the increased apron and new cargo handling aids would substantially increase the actual capacity to process passengers and operations, as set forth in detail in our original comments. Any limitation to a level of use below that actual capacity would be in violation of the FAA rules for non-discrimination, and therefore, would likely be construed as arbitrary.

3. *Misrepresentation of FAA Approval* — Similarly, the FEIS repeatedly states that FAA has approved the Terminal Capacity Agreement. This allegation is without any support in the record, and seems to be misrepresentation. There is no citation to any document in which the FAA agreed to the terms of the Agreement. Instead, the FEIS refers back to the preliminary injunction decision in the *Midway* case and that fact that the FAA did not appeal that decision. As stated just above, this allegation is based on the misrepresentation of the holding in the *Midway* case. The Stipulation removed any need to appeal.

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[2] The *Midway* case is *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984).

It was based on capacity *at that time*. The Agreement was entered into after the *Midway* decision and Stipulation. It was neither executed nor approved by the FAA. There is nothing in the record which demonstrates that the FAA would agree to the extension and the application of the Agreement to any airport *whose capacity was greatly expanded*.

4. *Misrepresentation of the Capacity Agreement* – The FEIS states that the Capacity Agreement will continue in effect throughout the "forecast period" used in the FEIS – that is, for 20 to 25 years. Specifically, the FEIS states:

> "There is no provision in the new Agreement for terminating the Agreement prior to the end of the forecast period used in these studies . . . .[The County] has the right under the Agreement to continue to enforce both the capacity and the access plan. The only right the airlines have under the Agreement is to go to court and attempt that the capacities figure is unreasonable and arbitrary." FEIS at 7-13, 7-14.

This conclusory statement is not true. On the contrary, the Capacity Agreement specifically states:

> [T]he Terminal capacity limitation *shall expire January 1, 1995* and shall thereafter be reassessed in light of experience and conditions *current at that time*. If, after such a reassessment, mutual agreement on capacity is not reached, all parties reserve the right to take appropriate actions to protect their respective interests. (Capacity Agreement, Exhibit D to DEIS at D-3; emphasis added.)

Thus, the Capacity Agreement's limitations specifically expire on January 1, 1995. Thereafter, the airlines are free to take any action whatsoever "to protect their respective interest." Such action is not limited to lawsuits, but includes an application to the FAA under its non-discrimination rules. Most importantly, any limitations on use and access to the airport are based on the factual conditions at the "current time." The rationale for

the limitations now in place would dissolve with the greatly increased capacity of the Terminal and the increased ability of the airport runways, taxiways and other facilities to process operations. Thus, the language of the Agreement itself confirms the holding in the *Midway* decision that capacity and use limitations must be based on the actual capacities and facilities available at the airport. That decision, therefore, is the "law of the case" only insofar as it applies to airport terminal and other facilities before they are *modified and expanded.* It provides no basis whatsoever for any limitation to a specific figure once those facilities have been modified and expanded. Indeed, the limitation set forth in the Agreement was based on the County's analysis of the capacity of the facilities as they existed in 1984 and 1985. Therefore, and expansion of the airport's capacity to handle passengers and operations would necessarily render those limitation arbitrary. Since the limitations were based on a severely constricted terminal and limited taxiways and access to the runways, the quadruple size terminal and the improvements to the taxiways, holding pads and apron parking would make those limitations obsolete. Any attempt to enforce them in the "current conditions" (*i.e.*, with all of the modifications proposed in the FEIS and 1986 Update) would appear to be arbitrary.

Finally, the Agreement applies only to those airlines which signed it. It does not apply to, for example, American, Delta, Eastern, the Eastern Shuttle (now the Trump Shuttle) Empire, or the host of new commuter airlines now operating at New York area airports.

5. *Misrepresentation of Terminal Capacity* — The FEIS reiterates the allegation that the proposed 40,000 square foot terminal is the "smallest Terminal that might be considered acceptable, on the basis of professional criteria, to accommodate 240 passengers per half hour." (FEIS at 7-14.)

First, there is no statement of whose professional criteria is being invoked. This is not an inconsequential omission. Indeed, it is quite significant that the identity of the "new consultant" is not stated anywhere in the FEIS. It is belaboring the obvious to

to state that the invocation of "professional criteria" without identifying the source of that criteria makes it impossible for us, the FAA or anyone else to comment on or judge the validity of any evaluation based on those criteria.[3]

Moreover, the FEIS continues to ignore the fact that "professional criteria" of many other professionals, including the County's own earlier evaluation, led to significantly different results and a recommendation for a significantly smaller terminal. Thus, the FEIS does not analyze the purported deficiencies of the 16,000 square foot alternative, but merely states that it is not acceptable to the airlines and otherwise not adequate.

Even more important, the FEIS continues to ignore the study done by its own consultants in or about 1984 which suggested that a 20,000-24,000 would be adequate for the same level of operations and passenger use as the County now states require a 40,000 square foot terminal. No effort whatsoever is made to distinguish this earlier recommendation of the County's own consultants.

Finally, and perhaps most noteworthy, the FEIS fails to respond to the uncontestable fact that the John Wayne Airport in California processes almost *five million* (5,000,000 passengers per year with a terminal of 27,000 square feet, and is now considering expansion of its facilities to accommodate 8,000,000 passengers per year. There could be no better argument by any airline, whether a party to the Capacity Agreement or not, that a limitation to approximately 2,000,000 passengers per year with a terminal of 40,000 square feet is arbitrary when 5,000,000 passengers and the concomitant number of operations are handled at an airport with a terminal *two-thirds the size* of the proposed Terminal at Westchester.

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[3] Again, only excerpts of the report are produced in the FEIS and the sources of cited criteria are often omitted. This further undermines both the reliability of the report and its criteria and the ability of others to comment thereon.

THE DEFICIENT DEIS NECESSITATES SUPPLEMENTATION

The FEIS contains new information which is at the heart of the project's impacts. The FEIS contains, *inter alia*, what purports to be a new study on capacity at the terminal facility in the absence of any limiting agreements. That new information in itself is of sufficient significance to necessitate supplementation. ("Supplementation" is this case should entail the reissuance of the FEIS, as corrected, as a DEIS.)

The New York courts have addressed the question of when a supplement to a draft or final EIS may be required on a case-by-case basis as the issue arose in different factual contexts. From these cases, certain guiding principles have emerged. One principle is that a Supplemental EIS ("SEIS") is required if the DEIS fails to include a discussion of an issue required by SEQRA. In *Webster Associates v. Town of Webster* ("*Webster*"), 59 N.Y.2d 220, 454 N.Y.S.2d 431 (1983), the Court of Appeals rejected the argument that a FEIS could cure the deficiencies of a DEIS:

> [T]he omission of a required item from a draft EIS cannot be cured simply by including the item in the final EIS.

59 N.Y.2d at 228, 464 N.Y.S.2d at 433. The Court reasoned that although a final EIS must be made available to the public at least 10 days before the proposal is acted upon, that abbreviated period cannot substitute for the comprehensive procedures for public and agency review and comment on a draft EIS. *Id.*

The importance of including all significant information in the draft EIS is fully explained in a leading federal case pursuant to the National Environmental Policy Act ("NEPA").* *Appalachian Mountain Club v. Brinegar* ("*Brinegar*"), 394 F. Supp. 105 (D.N.H. 1975). In *Brinegar* the FEIS included traffic data that had been omitted from the DEIS. The Court, recognizing the impropriety of that action, enjoined construction of a segment of an interstate highway pending recirculation of the revised DEIS.

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* NEPA, enacted in 1969, was the predicate of SEQRA. *See Glen Head-Glenwood Landing Civic Council, Inc. et al. v. Town of Oyster Bay* ("*Glen Head*"), 88 A.D.2d 484, 453 N.Y.S. 2d 732, 734 (2d Dept. 1982).

The Court severely criticized the agency's attempt to put this information in the Final EIS and thus circumvent the NEPA mandates respecting the adequacy of the DEIS:

> In the first stage, a draft impact statement is prepared and circulated to the public and various agencies for comments and criticisms. This is the vital stage, for it is here that outside review can vitiate 'objective errors or excessive bias in an EIS',; *I-291 Why? Association, supra*, 372 F. Supp. at 258. This is the only time when the public and outside agencies are able to closely analyze the impact statement and their comments . . . must be included in the final EIS.

Id. at 121 (emphasis added). The Court went on to describe the differences in the review process between the DEIS and the FEIS and to point out the dangers of including essential data in the final EIS for the first time:

> There cannot be responsible decision-making when data appears in the final EIS without being subject to the critical evaluation that occurs in the draft stage. There are two dangers that can occur when information appears in the final EIS for the first time: (1) the ultimate decision-makers will believe that there is no controversy due to the lack of critical comment; and (2) objective errors without being red-flagged would go unnoticed. It is for these reasons that . . . [a] supplemental statement is to be processed in the same manner as a new environmental statement. 23 C.F.R. §1.38 p. 20 (1974).
>
> Supplemental information, which has not been processed in the same manner as a draft EIS, cannot resurrect a deficient impact statement. *I-29 Why? Association, supra*, 372 F.Supp. at 253-260.

Id. at 121-122 (emphasis supplied) (footnotes omitted). *See also Essex County Preservation Association v. Campbell*, 399 F.Supp. 208, 215-16 (D. Mass. 1975), *aff'd*, 536 F.2d 956 (1st Cir. 1976).

In another analogous case under NEPA, *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 170 (D.D.C. 1972), essential data was also omitted from a DEIS. The Court refused to dissolve a preliminary injunction enjoining the sale of certain oil and gas leases where an addendum prepared to remedy the deficient DEIS had not been subject to the comment and review procedures. The Court held that the addendum had to be recirculated, despite any attendant delays or difficulties. 337 F.Supp. at 172.

The same logic applies to SEQRA. *Webster, supra*. Indeed, this principle is more applicable to SEQRA because the time which an agency has between the issuance of the FEIS and final decision is much longer under NEPA (30 days) than under SEQRA (10 days). (*See* 40 C.F.R. §1506.10(b) and 6 N.Y.C.R.R. §§617.9, 617.10, respectively). This more abbreviated time for public and agency comment on the final EIS reinforces the critical nature of the draft impact statement. *See Webster, supra*, 59 N.Y.2d at 228.

The need for an SEIS also arises if newly discovered information renders the EIS inadequate. In *Glen Head*, the DEIS for a proposed condominium development indicated that the City of Glen Cove had orally committed to a tie-in with its sewerage treatment facilities. After SEQRA findings were made in reliance on this representation, it was ascertained that Glen Cove had not approved the tie-in and that the DEC had rejected the alternatives to the Glen Cove system. The Court held that an SEIS analyzing the project in light of the new information should have been circulated and reviewed in the same manner as the DEIS. 453 N.Y.S.2d at 739.

The holdings of *Webster* and *Glen Head* – that an SEIS should be prepared when the DEIS omits information required by SEQRA or new information is discovered subsequent to the filing of a DEIS – was confirmed in *Horn v. IBM* ("*Horn*"), 110 A.D.2d 87, 493 N.Y.S.2d 184 (2d Dept. 1985), *appeal denied*, 67 N.Y.2d 602, 499 N.Y.S. 1027 (1986):

> The law recognizes that in situations in which significantly new information has been discovered subsequent to the filing of a draft EIS, which new information is relevant to the environmental impact of the proposed action, a supplemental EIS containing this information should be circulated to the relevant agencies so as to insure that the decision making authorities are well informed (*Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay*, 88 A.D.2d 484, 453 N.Y.S.2d 732, supra). In this regard, the courts have cautioned that the omission of required information from the draft EIS cannot be cured by simply including the required data in the final EIS since the abbreviated comment period for the final EIS "is not a substitute for the extended period and comprehensive procedures for public and agency scrutiny of and comment on the draft EIS" (*Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 228, 464 N.Y.S.2d 431, 451 N.E.2d 189, supra).

493 N.Y.S.2d at 192.

The June 1987 SEQRA regulations provide in 6 N.Y.C.R.R. §617.8(g) for the supplementation of draft or final environmental impact statements. These codify the case law regarding SEQRA. As explained in the FEIS for the new regulations (at 27)

> Court decisions such as *Webster Assoc. v. Town of Webster, supra, Glen Head/Glenwood Landing Civic Association v. Town of Oyster Bay, supra*, and *Horn v. I.B.M.*, 110 A.D.2nd 87 have provided guidance on when a supplement is required. That guidance has been incorporated into this subdivision.

INADEQUATE DISCUSSION OF CUMULATIVE EFFECTS AND SEGMENTATION

Under NEPA, SEQRA and the FAA regulations, an environmental assessment must examine the cumulative environmental effects of a proposed action when added to other

past, present and reasonably foreseeable future actions. (40 CFR §1508.7; 6 N.Y.C.R.R. §617.11(b); FAA Order §26(a).

In the 1987 GEIS, the County assured the FAA that it would address *all* effects in the specific EISs to follow. *E.g.* GEIS at 7-1 to 7-4. The FEIS does not augment the DEIS' lack of analysis of cumulative effects but asserts that cumulative effects were in fact addressed in the GEIS. The County cannot defer consideration of cumulative effects in the GEIS and then proclaim that this analysis was, in fact, completed.

Similarly, the FEIS simply refers back to the Update in the issue of segmentation. This is totally inadequate. The Update referred to a series of further analyses. These have not been completed. Nevertheless, the County intends (apparently) to proceed with construction of the Terminal Project before any overall analysis is made of the effects of the myriad actions listed in the Update. This is precisely what the segmentation doctrine is designed to prohibit – implementation of a part of a single, integrated project before the effects of the entire project have been evaluated.

Thus, even if the FEIS for the Terminal expansion was complete and adequate for the Terminal segmant of the entire airport expansion (which it is not), it is patently improper for the County to implement (or for the FAA to fund) the Terminal expansion without an over-all analysis of the effects of the whole airport expansion project.

Thus, for example, the FEIS is not responsive to comments noting that consideration has not been given to the corporate hangars which are included as part of the project. The FEIS does not analyze:

1. why these hangars are necessary, if demand is limited to that which is projected;

2. the growth inducing effects of such enhanced facilities on:

- airport use, noise, traffic

- corporate office development in the surrounding area and the consequent socio-economic effects and effects on traffic and other environmental concerns.

Also, the FEIS does not analyze how the pending activities planned for the airport – such as the change in taxiway exits and holding pads – will impact with the quadruple size terminal to cumulatively effect operations or capability to handle larger passenger volume. The Update acknowledged that the taxiway and related changes would increase capacity. (Update at 3-2). However, no consideration is given in the FEIS to these subsequent related activities which are included in the long-range master plan for the area.

INADEQUATE CONSIDERATION OF ECONOMICS

The FEIS is similarly unresponsive to comments questioning the financing of the Terminal Project. The Master Plan Update deferred any analysis of the economics of the terminal expansion project stating that the terminal area development was to be analyzed in separate studies to follow. The FEIS now attempts to allege that the Update included a complete economic analysis of the new Terminal building.

The Update, however, specifically deferred analysis of the terminal project and, in fact, stated that it was likely the terminal area-related net income would not be sufficient to finance the terminal facility improvements. (Update at 6-14). Indeed, the portions of the Update cited and quoted by the FEIS refer to analyses for financing "*non-Terminal improvements*" (Update quoted in FEIS at 7-40; emphasis added). This explicitly contradicts the allegation that an economic analysis of the Terminal Expansion was made in the Update. In fact, no such analysis has been made public in Update. The FEIS or anywhere else, despite the representation in the Update that such analysis would be provided in the EIS for the Terminal expansion.

Moreover, the FEIS also states that a revenue bond financing approach is being considered. This is precisely the type of information which must be supplied in an EIS – together with the economic analysis which might support that approach. The failure to provide such information combined with the statements in the Update indicating that the Terminal operation would *not* be self-supporting at the current level of activity, is very weighty evidence that the County is planning on an expansion of activity to generate funds sufficient to finance the Terminal expansion. Any contrary conclusion could be supported only by an economic analysis – which is precisely what has been withheld.

In sum, the FEIS clearly does not provide a detailed analysis of any irretrievable commitment of resources as required by NEPA, SEQRA and the FAA regulations. (42 U.S.C. §4332(2)(C)(v); 40 CFR §1502.16; 6 N.Y.C.R.R. §617.14(6); FAA Order §85).

INADEQUATE DISCUSSION OF ALTERNATIVES

The FEIS is completely unresponsive to comments addressing inadequacies in this area. Instead of substantive analysis the FEIS states that "Long, open, public discussion of alternatives have been considered" at public meetings. While a number of alternatives to the terminal facilities project have been submitted to the County, neither the DEIS nor FEIS provides any reasoned analysis to illustrate why these alternatives were rejected. The FEIS does not adequately evaluate the Airport Consortium proposal and completely ignores the 1984 proposal by the County's own consultants.

The Airport Consortium submitted an alternative proposal for a 16,000 square foot terminal. This was rejected on the purported grounds that (a) it was too small to be comfortable at the capacity and operations which the County says will be maintained, and (b) it does not meet the airlines' requirements for a larger terminal stated in the Capacity Agreement. Both of these grounds are without foundation and are inconsistent with the FEIS itself.

Moreover, the FEIS simply ignores the County's original proposal. In 1984, Thompson Consultants advised the County that a 21,000 - 24,000 square foot terminal would be adequate. These are the same consultants who said in March 1988 that only a 41,000 square foot terminal would be adequate *for the same projected operations and passenger volume.*

The FEIS and DEIS make no attempt to address, analyze, or explain this inconsistency or the reasons why the County's *own alternative* was rejected. The implicit explanation is that the proposal was too small for the airlines because they and the County recognize that the *real* demand is for greater than claimed in the FEIS. Hence the County has proposed a terminal twice the size of that which the County's own consultants originally recommended as entirely adequate.

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Respectfully submitted,

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COMMENTS ON WESTCHESTER COUNTY AIRPORT

TERMINAL FACILITIES MODERNIZATION PROJECT

ENVIRONMENTAL ASSESSMENT AND FEDERAL AVIATION

ADMINISTRATION PRELIMINARY FINDINGS ON BEHALF OF THE

TOWN OF GREENWICH, CONNECTICUT AND AIR CONSERVATION TRUST, INC.

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COMMENTS ON WESTCHESTER COUNTY AIRPORT TERMINAL FACILITIES MODERNIZATION PROJECT ENVIRONMENTAL ASSESSMENT AND FEDERAL AVIATION ADMINISTRATION PRELIMINARY FINDINGS ON BEHALF OF THE TOWN OF GREENWICH, CONNECTICUT AND AIR CONSERVATION TRUST, INC.

INTRODUCTION

These comments are submitted on behalf of The Town of Greenwich, Connecticut and on behalf of Air Conservation Trust, Inc. on the proposed Westchester County Airport Terminal Facilities Modernization Project and revisions to the Airport Layout Plan. The Environmental Assessment ("EA") and Preliminary Findings to the EA were prepared pursuant to FAA Order 5050.4A, "FAA Airport Environmental Handbook" ("FAA Order"), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 *et seq.*

The centerpiece of the FAA's Preliminary Findings is its conclusion that the proposed changes to Westchester County Airport's Airport Layout Plan ("ALP") – particularly the expansion of the Terminal Facilities and aircraft parking apron and the high speed exits – will not increase the number of passengers per hour or aircraft operations which would occur if the ALP was unchanged. In other words, the FAA concluded (preliminarily) that the capacity and actual use of the airport will not be changed by replacement of the existing 10,000 square foot terminal with the proposed 41,000 square foot terminal – there will be 680 passengers per hour in the No-Build and 680 passengers in the Build.

It is respectfully submitted that the FAA's conclusion is fatally flawed. More bluntly, the accompanying analysis by TAMS Consultants, Inc.* demonstrates that the FAA's conclusion is simply

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* TAMS Consultants, Inc. is a world-renowned consultant for airport development. The TAMS Report was prepared by Ronald W. Pulling, P.E. and his staff. Mr. Pulling has been actively engaged in airport consulting for over 40 years. He has held senior level management positions in the FAA including Deputy Associate Administrator for Plans directing the activities of the FAA's offices of Environmental Quality, Policy and Plans, among others. Mr. Pulling's resume, TAMS' airport brochure and statements of TAMS' professional experience with airport projects world-wide are annexed to the TAMS Report.

wrong on both ends: (1) the use of the Airport will not approach 680 passengers per hour if the ALP is not revised (the No-Build); (2) the capacity will be 1000 passengers per hour in the Build scenario, and (3) the full capacity of 1000 passengers per hour will be utilized if the proposed federal action is approved.

PRIOR PROCEEDINGS

The Town and Trust previously submitted comments on the EA in the form of comments submitted on the Draft Environmental Assessment and Draft Generic Environmental Assessment ("DEIS") and the Final Environmental Impact Statement ("FEIS"). A number of those comments remain unanswered. The cumulative effects of the proposed changes have not been analyzed, despite the premise to do so in the 1986 Generic Environmental Impact Statement. The growth inducing effects of the proposal for at least two major hangars for corporate aircraft have not been investigated at all. The cumulative effect of the airport and terminal projects when added to at least twenty-five projects currently proposed for the surrounding area – the Postal Facility, office and townhouse projects, hotel/conference center, etc. – has been ignored. The cumulative effects on habitat and wildlife have received cursory attention, at best, not the "hard look" required by NEPA.

NEPA does not permit division of a project into small parts, each of which, when taken alone, would not have a significant effect upon the environment *City of Rochester v. U.S. Postal Service*, 541 F.2d 967 (2nd Cir. 1976). In fact, characterizing any piecemeal development of a project as "insignificant" merits close scrutiny in order to preserve the policy of NEPA from being nibbled away by multiple increments no one of which may in and of itself be important enough to compel a finding of significant environmental impact. *See Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089 (9th Cir. 1975). The FAA's Preliminary Findings fail to acknowledge that many parts of the airport layout plan were never addressed in the EA thus violating NEPA.

Moreover, under NEPA and the FAA regulations, an environmental assessment must examine the cumulative environmental

effects of a proposed action when added to other past, present and reasonably foreseeable future actions. (40 CFR §1508.7; FAA Order §26(a)).

The Preliminary Findings do attempt to address comments which showed that the EA failed to analyze the airport's increased capability to process passenger and aircraft operations, but the attempt is unsuccessful. The analysis presented in the DEIS of capacity and number of operations was based on alleged constraints in the Airport Stipulation and Airport Capacity Agreement. However, the Town and Trust's comments to the DEIS emphasized that the Capacity Agreement could not limit operations. The FAA is not bound by the Agreement and the FAA's non-discrimination rules prevent the county from enforcing it. The FAA agreed, and directed the County to base its environmental review on conditions unconstrained by the Stipulation or Capacity Agreement.

In response, the FEIS purported to include an additional study of airport capacity under "unconstrained" conditions or in the absence of any purported limiting agreements.

THE PRELIMINARY FINDINGS ARE BASED ON DEMONSTRABLY INCORRECT ASSUMPTIONS

The FAA has now issued Preliminary Findings based upon this purported study of unconstrained airport capacity. The FAA's Preliminary Findings state, "the analysis justifies that the environmental effect of these calculated unconstrained activity levels, if they were to occur in the absence of a Terminal capacity limit, are not of a significant nature". (Preliminary Findings, page 8).

As stated above, the Preliminary Findings turn on their conclusion that the unconstrained capacity if the project were not built would be 680 passengers per hour and would be the same 680 passengers per hour if the project is built. Therefore, the FAA argues, since construction of the project will not change the capacity of the airport, neither the operations nor the passenger level will increase as a result of the project. Since there

will be no increase in capacity or use, the construction of the project will not cause any change in environmental conditions from what they would be if the project were not built.

The FAA's conclusion is based on the following "facts":

- the turn around cycle for large aircrafts takes about one hour;
- only two large aircraft can be loaded or unloaded at one time because larger aircraft can only use the two gates designated for them;
- the size and strength of the ramps and aircraft parking positions limit the use of the airport facilities to two large aircraft per hour;
- MD-80 aircraft cannot use the airport because their maximum weight is 147,000 pounds, which is in excess of the runway design capacity of 120,000 pounds;

The TAMS Report demonstrates that each one of the purported "facts" on which the FAA relies is untrue. Rather, the TAMS report demonstrates that the FAA's preliminary finding of no significant effect is not consistent with the trend toward growth in operations taking place at Westchester nor with the Airport's proposed configuration which creates significantly greater capacity.

In short, the FAA claims that both the No-Build and the Build traffic will be 680 passengers per hour. The assumptions on which that conclusion is based are demonstrably incorrect. The real situation is that (a) the No-Build traffic will be significantly less than 680 passengers per hour and is unlikely to exceed the currently authorized 480 passengers per hour, and (b) the Build traffic will be at least 1000 passengers per hour. Thus, the FAA's and the EA's central thesis fails on the demonstrable facts. There will be a major increase in traffic—in face, a doubling. Therefore, it is extremely likely that the proposed project will cause significant environmental impacts and an EIS analyzing those impacts is required under NEPA and the FAA Order.

The No-Build Alternative Is Not Properly Analyzed

The EA itself, prepared in November 1988, states that "the existing terminal and parking are now so deteriorated, overcrowded and outdated that new facilities are required." The DEIS also states that passenger traffic, estimated at 680 passengers an hour, requires a minimum of a 41,000 square foot terminal building. Using the County's own analysis, therefore, the 10,000 square foot facility currently in existence will be completely saturated long before the estimated growth from 400,000 passengers in 1985 to 1,647,000 passengers in 2006 is attained and long before traffic reaches 680 passengers per hour. This is confirmed by the TAMS Report, p.2. Such over-saturation would result in a large number of passengers using other airports. It is clear that the current terminal cannot accommodate 680 passengers per hour if the EA also concludes that only a 41,000 square foot terminal is required. Indeed, the public comments on the EA are unanimous in lamenting the appalling conditions for passengers and safety of the present facility at the current rate of traffic. In short, the actual use of the Airport will be much lower than 680 passengers per hour if the current facilities are not replaced.

Moreover, it is apparent that substantial disbenefits will result from the over-saturation of an airport facility which is already stretched way beyond its capacity. The disbenefits can only increase in the No-Build condition as use rises to the level of 480 passengers per hour which the FAA has authorized. Since a federal action has been proposed, FAA Order 5050.4A, ¶¶ 47(e)(3) and (4), 85, requires that an EIS analyze these disbenefits which would occur in the "No-Build" alternative.

The Capacity of the Proposed Facility Is 1000 Passengers Per Hour

In reality, the new terminal will be able to process many more passengers than the 680 per hour stated in the EA. The EA asserts that the new 41,000 square foot terminal can accommodate, at a comfortable level, consistent with FAA criteria, 650-700 passengers per hour. The EA and the FAA's Preliminary

Findings admit that terminals do operate at much higher levels than their design capacity. A 41,000 square foot terminal building might be optimal for 650 passengers per hour when demand is low, but in reality the actual capacity of such a terminal is much greater. John Wayne Airport in California, with a terminal two-thirds the size of the proposed terminal at Westchester, processes almost 5,000,000 passengers a year.

A. *The Ramp Provides Capacity For Six Group III Aircraft At Any Time*

The capacity of the Ramp is six large, Group III aircraft at any one time, not two. Chart 5 of the TAMS Report demonstrates that six Group III aircraft can be parked on the ramp at the same time, meeting all FAA criteria. The Preliminary Findings conclude otherwise, but present no schematic diagram to support that conclusion or to contradict the graphic actuality of Chart 5.

Moreover, Chart 5 is entirely consistent with the FAA's own model airport layout which suggests that aircraft be parked in front of rental car areas as well as the terminal itself. This is demonstrated by Chart 6 in the TAMS Report, which is reproduced from the FAA's own Advisory Handbook.

Passengers are not limited to boarding and deboarding through a "bridge" at the Terminal gates. They can simply walk in defined walkways from the Terminal to the parked aircraft. This occurs at many airports the size of Westchester County's. Islip Airport is merely the closest example. No bridges are in use now at Westchester; the passengers walk to the aircraft. All of the commuter line passengers will continue to walk to their aircraft in the design for the proposed Terminal. Walking to the aircraft from the terminal is also consistent with the model layout in the FAA's Advisory Handbook, reproduced at Chart 6 of the TAMS Report.

B. *Turn-around Time*

Capacity is also determined by airplane turn-around time, but the actual turn around time at Westchester is much lower

than the one-hour estimated in the EA and adopted in the FAA's preliminary findings of no environmental effect.

The daily flight schedules for Westchester County Airport, as reported in the Official Airline Guide for May 1989 and tabulated in Tables 3, 4 and 5 of the TAMS Report, disclose that the FAA's assumption of a one-hour turn around time is inconsistent with current operations at Westchester Airport. In fact, the average turn around time is *twenty-six minutes*, with only one flight of the sixty-six daily arrivals exceeding one hour. The following are some examples of the current turn around time for planes which terminate flights at Westchester and then are used to originate departing flights.

- Northwest Flight 1148 arrives from Detroit at 5:42 p.m. and the same DC-9 leaves as Flight 1151f or Detroit at 6:12 p.m.

- United Airlines Flight 274 arrives from Chicago at 10:30 a.m. and the same 737 leaves as Flight 700 for Chicago at 11:00 a.m.

- Northwest Flight 1144 arrives from Detroit at 9:59 a.m. and the same DC-9 leaves as Flight 1132 for Detroit at 10:29 a.m.

The smaller commuter planes turn around even faster:

- Piedmont Flight 4401 arrives from Baltimore at 9:10 a.m. and leaves as Flight 4408 for Baltimore at 9:29 a.m.

- American Airlines Flight 4949 arrives from Washington at 10:39 a.m. and leaves as Flight 4924 for Washington at 10:59 a.m.

- United Airlines Flight 2350 arrives from Washington at 11:00 a.m. and leaves for Washington at 11:20 a.m.

- American Airlines Flight 4843 arrives from Boston at 12:45 p.m. and departs as Flight 4914 for Boston at 1:05 p.m.

Moreover, many flights do not originate or terminate at Westchester, but stop there "en-route', and their stop-over time is very short:

- American Airlines Flight 4948 arrives from Poughkeepsie at 7:30 a.m. and departs for Washington at 7:45 a.m.

- Piedmont Airlines Flight 4811 arrives from Poughkeepsie at 8:30 a.m. and departs for Binghamton at 8:45 a.m.

- Delta Flight 3711 arrives from Hartford at 7:00 a.m. and departs for Philadelphia at 7:10 a.m.

- Delta Flight 3617 arrives from Boston at 9:41 p.m. and departs for Hartford at 9:51 p.m.

Table 5 also indicates that seven aircraft currently remain on the ground overnight, showing again that the EA and the FAA underestimate airport parking capacity.

In short, lower turn-around times than forecast and more parking on the ramp than projected in the EA demonstrate the EA's understatement of the new terminal project's increased capacity.

C. *The 120,000 Pound Limit*

The 120,000 pound limit is not a real constraint. First, the TAMS Report is based on the use of 737s and F-100s, both of which are well within the design limits of the Airport. The major airlines which already use the Airport have many of these aircraft in operation and on order. United Airlines operates 125 Boeing 737s; has placed a firm order for an additional 120 and an option for 130 more. In March, 1989, American Airlines placed orders and options for 150 F-100s. (TAMS Report, p.3, Table 2). U.S. Air operates 68 Boeing 737s. In April, 1989, U.S. Air placed orders for an additional 18 Boeing 737s and options for 36 more, *plus* prior orders for 20 F-100s and options for 20 more (N.Y. Times, 5/4/89, D4). Consequently, growth can occur

without ARFF restrictions, runway strengthening or increases in runway length. (TAMS Report, p.3).

Moreover, DC-9s and MD-80s are often operated at less than their maximum gross weight. There is no reason why they cannot be limited to 120,000 pounds at the Airport, since the scheduled flights are well below their maximum range, they will not need (and would not want) to carry a full fuel load, and the load rate used in the EA's and FAA's projections was only 66%.

The final proof that the 120,000 pound limit is not a real constraint is the simple fact that Northwest Air operates ten DC-9 flights per day at Westchester Airport.

Northwest Airlines operates 144 DC-9s; U.S. Air operates 31 MD-80s and 74 DC-9s, as well as 68 Boeing 737s. American Airlines operates 118 MD-80s, and has ordered 62 more. (TAMS Report, Table 2). On May 3, 1989, U.S. Air announced that it had placed orders for 20 new MD-82s and options for 20 more. (N.Y. Times, *supra*).

In sum, the proposed layout will easily accommodate 1000 passengers per hour.

The 1000 Passenger Per Hour Capacity will Be Used

The future demand projection for Westchester County Airport indicates steady and increased growth. Charts 2, 3 and 4 of the TAMS Report depict the number of total seats on aircraft using Westchester Airport in half hour increments. The total seats per day in 1983 was 939, in 1986 the number of seats was 265 and in 1989 the total numbers of seats was 3050. These charts show clearly the amazing increase in demand occurring presently at Westchester Airport.

The increase which has occurred so far in operations has taken place by a levelling off in number of occupied seats at any given hour during the day. The comparison between seats in 1983 and seats in 1989 is particularly striking. Not only has the absolute

total increased dramatically, but the distribution of these seats has changed from almost total concentration in the morning and evening peak hours to an almost equal distribution throughout the day. This reflects the increasing use of large planes throughout the day.

A large growth in demand can also be predicted for Westchester Airport due to the current market penetration both at Westchester and at the areas serviced by Westchester. Table 4 of the TAMS Report indicates May 1989 flights at Westchester Airport by point of origin/destination. Forty of these sixty-six flights to and from Westchester were from flight centers with very large and rapidly increasing markets such as Boston, Baltimore, Detroit, Philadelphia, Poughkeepsie and Washington, D.C. Even currently, an average of 15 flights come from Boston to Westchester, 15 from Baltimore, 10 from Philadelphia, 7 from Poughkeepsie and 17 from Washington, D.C. per day.

The Airport is serviced by major airlines: Delta, United, American, Northwest, U.S. Air, Piedmont. With increased capacity, these major carriers will undoubtedly seek to extend their service to their "hubs" not currently serviced. Chart 7 of the TAMS Report depicts new cities which are "hubs" of the carriers now operating at Westchester, within the range of their existing flights. These "hubs" are transfer points for flights to more distant destinations. For example, Charlotte ("CLT") offers non-stop flights to Los Angeles, Pittsburgh ("PIT") is a U.S. Air hub, Cincinnati ("CUG") is a Delta hub, Dayton ("DAY") is a U.S. Air hub and Raleigh/Durham ("RDU") is an American Airlines hub. Each of these additional hub destinations are likely candidates for new direct service from Westchester to all of the major domestic air passenger markets.

An increase in demand and a resulting growth in number of operations can also be surmised from the fact that the airlines using Westchester Airport are currently replacing their fleet composition with larger aircraft. As illustrated in Table 2 to the TAMS Report, American Airlines, United Airlines, Delta, Piedmont, U.S. Air and Northwest Airlines are replacing their fleets with larger aircraft, particularly 737s and F-100s, together with

DC-9s and MD-80s. An increase in the size of aircraft and an anticipated expansion into additional hubs all indicate substantial growth in the number of operations and total traffic at Westchester.

In addition, the FAA's *own estimates*, as presented in the National Plan of Integrated Airport Systems, also contradict the EA and Preliminary Finding's conclusion that no increase in capacity will result from the proposed terminal project. According to the National Plan, the FAA will be spending approximately $7,000,000 to increase the capacity of Westchester Airport. The National Plan also predicts a total of 318,000 operations by 2000, illustrating again a marked understatement in the EA's estimate of only 280,000 operations. There can be no doubt that demand is growing at Westchester and that the full capacity of the Airport will be exploited.

Finally, and perhaps most revealing of the EA's attempt to disinform, the EA statement that demand will reach 1.7 million passengers per year is based on a 1977 study which found that the demand would be *4 million* passengers per year, coming from Westchester and Putnam Counties, New York and Fairfield County and Connecticut.

The EA includes only that portion of the 1.7 million passenger demand projected by the 1977 study to come from Westchester County. It simply ignores the 2 million-plus demand projected to come from Fairfield County, immediately abutting the airport, and from nearby Putnam County.

In other words, Westchester County prepared the EA and, as far as Westchester County is concerned, only Westchester County is worthy of consideration. This approach was confirmed by Westchester County Executive Andrew O'Rourke who said, in a telephone interview on a morning radio talk show recently as reported in the Greenwich Times (copy attached):

> I'm not dealing with Greenwich [Connecticut]. When the day comes when Greenwich allows me and Westchester to set up traffic patterns in downtown

> Greenwich, I'll talk to them about having them control the airport. *The only people I deal with are other elected officials in Westchester County.*

Of course, Mr. O'Rourke is wrong. Neither he nor his County can ignore Fairfield County (or Putnam County) when requesting federal approval of actions which will have significant effects on them. Indeed, Greenwich's downtown traffic plan could not ignore any potential traffic impacts that plan would have in Westchester. Mr. O'Rourke's xenophobic, isolationist views are reflected in the EA, most notably in its exclusion of all consideration of demand from Fairfield and Putnam Counties. There is no place for such views in a document prepared under federal law and regulations for a federal agency. Mr. O'Rourke's views emphasize the need for an EIS prepared by the FAA in conformity with the requirements of NEPA and the FAA Order.

NOISE

The FAA's Preliminary Findings states that there will be no environmental impact in terms of increased noise at the airport. This finding is predicted on the unfounded assumption that capacity and number of operations will not be increased. As demonstrated above, this assumption is incorrect and illustrates that the EA has fallen short of the requisite "hard look" at project impacts and alternatives. Moreover, the FAA also predicates its finding in regard to noise impacts on the EA's assertion that new aircraft, although larger in size, will also be quieter than the aircraft currently in operation at Westchester. However, without legislative action Stage 2 aircraft will also continue to use airports such as Westchester and will not be entirely phased out by the quieter Stage 3 aircraft. For this reason, noise contours should be developed for all Stage 2 aircraft and also developed for the airport in view of the terminal's capacity and increased ability to process a greater number of daily operations.

WATER QUALITY

The FAA's Preliminary Findings improperly defer consideration of mitigation measures for impacts to water quality. The

FAA's findings merely state that in the Build alternative "the airport drainage system would be redesigned to comply with the County's policy mandate that the plan shall not be construed so as to increase existing run-off levels."

This is clearly insufficient. Water quality impacts must be evaluated and the drainage system and its effectiveness analyzed before the projects are approved. They must be submitted for review in the NEPA process, allowing public scrutiny and comment. FAA Order §47e(6).

An EA must include a full discussion of significant measures which will be taken to mitigate adverse environmental impacts of the proposed action. FAA Order 5050.4A §47e(6); 40 CFR §1502.16(h). The mere listing of undeveloped mitigation measures is insufficient to satisfy the NEPA requirements. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986); *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1984, 1993 (9th Cir. 1987).

The EA is inadequate. It fails to present *any* water quality mitigation. It does not even take the first step of evaluating the impacts on water quality before mitigation. Thus, the EA violates the commands of NEPA by deferring the effectiveness consideration and public scrutiny of water quality impacts and of proposed mitigation drainage measures and simply relying on the EA's bald, unsupported assertion that runoff will be appropriately mitigated. The specific manner of directing runoff to Blind Brook must be analyzed as must the remaining drainage to Rye Lake in order for the EA and Preliminary Findings to be in compliance with NEPA.

The County's failure to address appropriate mitigation measures for adverse impacts on water quality is compounded by the County's opposition to the proposed Post Office facility on the airport property where the County asserts that the Post Office has not made any evaluation of its projects' impacts on the water runoff and quality.

Thus, the *Westchester Joint Water Works* has stated that the Post Office facility and the revised airport will contaminate Rye Lake and suggests that a water treatment plant may have to be constructed to satisfy the state water quality standards.

The *Westchester Soil and Water Conservation District* stated that a hydrologic study of the stream and the entire watershed surrounding the airport was necessary to evaluate the surface and groundwater of the Post Office – and that detention basins must be larger to preserve water quality as flood control.

The terminal project is many times the size of the Pose Office, with much more traffic and other sources of pollution. Yet, these water issues which are so important to the County for the Post Office on the airport property are ignored in the terminal EA.

In the vernacular, the County has said: "Trust us. We'll take care of it. We don't need public review of this important environmental issue. Don't worry." This is insufficient under NEPA. It should be insufficient for the FAA.

SIGNIFICANT CONTROVERSY

Both the FAA Airport Environmental Handbook* and NEPA** state that one of the principle reasons for requiring an Environmental Impact Statement is significant controversy over proposed federal action. It is hard to imagine a federal airport action more controversial than the proposed Terminal Facility at Westchester County Airport. Some 500 people appeared at

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* FAA Order 5050.4A, Section 24(a) and (e)(1), *Extraordinary Circumstances*, states that a full environmental assessment must be prepared if an action is likely to be highly controversial or if an action is likely to cause substantial division or disruption of an established community.

** Council on Environmental Quality Statement on Proposed Federal Actions Affecting the Environment, Guidelines §5(b), 36 Fed. Reg. 7724.

the public hearing on the EA. Only one person spoke in favor of the proposed action. Even more striking, *every single Town surrounding the Airport has joined the Airport Consortium opposing the Terminal Facility as it has been proposed.* The opposition is virtually unanimous among citizens who will be directly affected.

CONCLUSION

The opposition to this project has been thoughtful and responsible. It is based primarily on the undeniable increase in large aircraft operations and traffic which the proposed ALP and Terminal Facility will generate, transforming Westchester Airport into a major reliever for LaGuardia and feeder into the major airlines eastern hubs. Like most of the citizens who have expressed their grave concerns, neither the Town of Greenwich nor the Air Conservation Trust oppose the improvement of the Airport facilities to provide increased safety and convenience. We support better parking, a modern, up-to-date facility and a new and appropriate terminal. "Appropriate" is the key word. The alternative of a 16,000 - 20,000 square foot terminal as proposed by IPM-Barbarovic and originally proposed by the County's own consultants, Thomson & Crenshaw, *is* appropriate. It is a size consistent with the County's stated policy to maintain realistic capacity limit of 480 passengers per hour. A new terminal of 41,000 square feet is not appropriate, nor is a parking facility built into a hill, which is required to accommodate the proposed 41,000 square feet terminal.

The demand for additional capacity to relieve overcrowding at LaGuardia, and even Kennedy, is well known to the FAA and needs no documentation. The huge growth in operations and traffic at Islip is obvious proof of that demand. The proposed ALP and Terminal Facility will allow the airlines to use Westchester County Airport to its utmost capacity, feeding their hubs with the huge number of Group III aircraft they now operate and have ordered, and extending their nationwide networks. Six major airlines already use Westchester County Airport; more will follow as soon as the capacity is available. This

undeniable demand, and the capacity to meet that demand demonstrated in the TAMS Report, will radically change the nature and the extent of operations at Westchester. The failure to comprehensively analyze the effects of such a change violates the letter and the spirit of NEPA and the FAA Order.

The use of Westchester Airport without the proposed changes cannot exceed 500 passengers per hour, if that. The use with the proposed changes will be at least 1000 passengers per hour. The difference is monumental and requires full-scale environmental review by the federal agency whose action is needed. The Towns, Counties and citizens who are affected are being ignored by the County; apparently viewed as obstacles to be overcome rather than concerned citizens and municipalities who are doing nothing more than asking that Westchester abide by its *own expressed policy* of maintaining the level of use of the Airport at its currently authorized level. This clash of local governments epitomizes the type of controversy which requires a *federal* analysis, not an incomplete review by advocates for one side of the clash.

With the greatest respect, it is not clear why the FAA has stretched so far to avoid a comprehensive environmental review by, among other things: (a) greatly overestimating the No-Build passenger volume while fully aware that the present facilities can barely handle existing volume; (b) basing its analysis on a one-hour turn around time for only two large aircraft when the current turn around for large aircraft is one-half hour, en-route flights require even less "stop over" time, the proposed ALP demonstrably accommodates six large aircraft while following all FAA criteria and the FAA's own model ramp/terminal layout, and the limitation to two "bridge" gates is contrary to operations at most comparable sized airports; and (c) relying on a 120,000 pound limit which does not apply to the operations of Group III aircraft in use and on order and which *does not now limit* the use of the Airport by aircraft such as the DC-9 and MD-80 which have higher maximum gross operating rates.

Again, with the greatest respect, the FAA should not be stretching the facts and its collective imagination looking for

ways to avoid the Congressionally mandated environmental review. This is perhaps the best imaginable, text-book example of a situation where the FAA should be exerting its ability to implement the policies and goals of NEPA and its own environmental regulations by conducting its own, comprehensive environmental review. The potential for environmental impacts has been demonstrated. The failure to analyze them violates the most basic principles of NEPA.

Dated: New York, New York
May 5, 1989

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REVIEW OF FAA ANALYSIS OF WESTCHESTER COUNTY AIRPORT DEVELOPMENT

May 4, 1989

This report has been prepared as a result of the issuance of a preliminary analysis by the FAA of an environmental assessment (EA) covering a number of Federal actions for further development at Westchester County Airport (HPN) White Plains, New York. The report responds to only one of the proposal developments, the new passenger terminal, and associated ramp.

The preliminary analysis concludes that the new terminal will not impact on the environment for two principal reasons, (1) future demand can be met by continued use of the existing facility, the "no-build" alternative and, (2) the new 41,000 sq. ft. terminal is considered minimal to support the projected demand at the airport.

A review of the past growth and long term future growth trends does not support the conclusion that the "no-build" alternative, has no significant environmental impact as defined by the EPA.

The Environmental Assessment, prepared in November 1988, states, "The existing terminal and parking are now so deteriorated, overcrowded and outdated that new facilities are required."

The assessment states that passenger traffic, estimated at 680 per hour, requires a minimum of 41,000 sq. ft. of terminal space.

The use of a 10,000 sq. ft. facility and growing demand for air service will undoubtedly result in complete saturation of the terminal complex long before the traffic will reach 680 passengers per hour and long before the total passenger increase from 400,000 in 1985 to 1,647,000 in 2006 is attained. Therefore, it appears to be physically impossible for there to be traffic at the rate of 680 passengers per hour in the existing no-build condition.

The socio-economic disbenefit from this saturation will result in a large number of passengers using other less convenient airports at added cost to the traveler both in terms of time and money.

No analysis has been made of the disbenefit which would result from the over saturation which would occur if the terminal facility were not built. Now that a federal action has been proposed, FAA Order 5050.4A, Airport Environmental Handbook paragraphs, 47e(3) and (4), and 85, requires an EIS to analyze the disbenefit which would occur on the "no-build" alternative.

The new terminal building is capable of accommodating, at a comfortable level, consistent with FAA criteria, 650-700 passengers per hour. See Chart 1. As stated in the analysis, terminals do operate at a much higher level than their design capacity. A peak capacity of 1000 passengers per hour would not be intolerable. Consequently, the environmental impact associated with a higher level of passenger capacity requires the preparation of an EIS.

The analysis further states that in combination with other restraints, ARFF, runway length and strength, aircraft gates and turn around times, the design will not accommodate more than the 680 passengers per hour. This conclusion is not consistent with the airport layout or the operational characteristics of the airline operations.

In view of the added terminal capacity available, and future demand projection, a review of past and future trends in aircraft use was undertaken. The following information was developed.

Charts 2, 3 and 4 depict the number of total seats on aircraft using the airport in one half hour increments. The total per day in 1983 was 939, in 1986 2650, and in 1989, 3050, in and out. A review of the aircraft fleet mix, Table 1 "Aircraft In Use, Westchester County" from 1983 to 1989, delineates the shift to larger aircraft over time.

Future aircraft mix is predicated on demand and on the fleet composition of the air carriers. It is expected that continuing trend of aircraft using Westchester County will be to increase in size. Aircraft currently on order by the air carriers using HPN are depicted on Table 2. As this is being written, United Airlines has just placed a firm order for 120 and an option for an additional 130 Boeing 737's. In March 1989, American Airlines placed orders and options for 150 Fokker 100's. Consequently, growth can occur without ARFF restrictions, runway strengthening, or increases in runway length.

The ramp is capable of accommodating six Group III aircraft at one time. Chart 5 delineates the maximum number of aircraft that can park on the ramp and still meet FAA safety criteria. The extension of the parking area beyond the terminal face is consistent with FAA recommendations, see Chart 6.

Ramp capacity is also determined by turn-around time. The analysis indicates that turn around time is estimated at one hour. Table 5 depicts the scheduled arrival and departure times for May 1989 traffic. Analysis of this data indicates an average turnaround time of less than 30 minutes with only one flight of the 66 arrivals exceeding one hour. Seven aircraft remain overnight. Consequently ramp capacity is greater than stated.

Growth is also determined by market penetration. The following tables illustrate current service patterns. Table 3 depicts May 1989 flights by point of origin. 40 of the 66 daily flights are turnaround flights. Table 4 depicts the May 1989 flights by the carrier. Table 5 depicts these same flights by time of day.

Growth in these markets will occur by, (1) use of larger aircraft, (2) greater frequency in schedules and, (3) higher load factors. Future growth could also incorporate flights to locations not now served directly by carriers operating from White Plains. Chart 7 depicts existing major and several likely additions. The new cities are "hubs" served by the carriers now operating at HPN, and consequently open up direct service from the airport to all of the major domestic air passenger markets.

Larger aircraft (including Design Group III), lower turnaround times than forecast, more parking area on the ramp than depicted all are indicative of the added capacity to the airport which could be used to increase yield, optimize revenues and satisfy future demand. It appears that significant environmental impact occurs by increasing the capacity of the airport beyond the levels projected in the environmental assessment. Where there is a high degree of controversy on environmental grounds (FAA order 5050.4A, paragraph 47 f[4]), actions such as these require an EIS.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 90-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF RYE, NEW YORK; TOWN OF NORTH CASTLE, NEW YORK; CITY OF RYE, NEW YORK; TOWN/VILLAGE OF HARRISON, NEW YORK; TOWN OF NEW CASTLE, NEW YORK; TOWN OF MT. PLEASANT, NEW YORK; TOWN OF GREENWICH, CONNECTICUT; AIR CONSERVATION TRUST, INC.; AIRPORT CONCERN TEAM, INC.; WESTCHESTER COALITION TO LIMIT AIRPORT EXPANSION, INC.,

Petitioners,

—against—

SAMUEL K. SKINNER, Secretary of Transportation; JAMES B. BUSEY, Administrator, Federal Aviation Administration; THE FEDERAL AVIATION ADMINISTRATION; DANIEL J. PETERSON, Regional Administrator, Federal Aviation Administration; WILLIAM HANDEL, Manager Airports Division, Federal Aviation Administration; COUNTY OF WESTCHESTER, NEW YORK; ANDREW P. O'ROURKE, County Executive for the County of Westchester, New York; WESTCHESTER COUNTY BOARD OF LEGISLATORS; WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION,

Respondents.

BRIEF OF WESTCHESTER COUNTY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration (FAA) procedurally complied with the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 et seq, the Regulations of the Council on Environmental Quality (CEQ regs), 40 C.F.R. Part 1500 and FAA Order No. 5050.4A (5050) concerning public involvement, before issuing the Record of Decision (ROD), Finding of No Significant Impact (FONSI) and Airport Layout Plan (ALP) regarding the proposed fourteen (14) items of improvement for the Westchester County Airport, when the FAA and Westchester County conducted public hearings and received written comments on every draft environmental assessment (EA); the FAA circulated for comment its Preliminary Analysis

(PA) of the EA; and the FAA's further independent analysis of October 1989 pertaining to terminal capacity/use itself was done in direct response to each of the previous comments generated by the Petitioners?

2. Whether the FAA's issuance of the FONSI based on the EA of the Westchester County Airport project improvements was arbitrary and capricious?

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CITATIONS OF OPINION BELOW

Westchester County Respondents accept the Petitioners' citation of the opinion below which is reproduced in the Appendix to the Petition for Certiorari.

The unreported administrative opinions of the FAA, the Record of Decision (ROD) dated November 30, 1989, the Finding of No Significant Impact (FONSI) dated November 30, 1989 and the Airport Layout Plan (ALP) dated February 28, 1990 are reproduced in the Appendix to the Petition for Certiorari.

STATEMENT OF THE CASE

Westchester County Airport, located in Westchester County, New York, was constructed under the auspices of the Federal government in the early 1940's as an air defense satellite base for New York City and was turned over to the County in 1943. Throughout the years, the Airport has developed into primarily a general aviation facility; there is a limited amount of air carrier and commuter activity, serving mainly residents and business travelers in Westchester and Fairfield, Connecticut counties. The present passenger terminal, a surplus military shed, a Quonset hut brought from Guam in 1946, has a total floor area of 10,000 square feet which serves air carriers,

commuter airlines and is undisputably in dire need of replacement.

Since the 1970's, the County of Westchester has undertaken comprehensive studies to increase the safety, efficiency and utility of the the Airport. In 1980, a proposed Master Plan study for the Airport was published; the emphasis of the plan was improving facilities for existing users, including the construction of a new terminal. Following its publication, the County began a study of the environmental impact of the proposed items of improvement, and at the request of the FAA, commenced an EA pursuant to NEPA on the ALP; the County voluntarily expanded the NEPA EA to fulfill the requirements of a Generic Environmental Impact Statement

(GEIS) under New York State law's more stringent standards set forth in the New York State Environmental Quality Act, (SEQRA), Environmental Conservation Law §§8-0101 et seq and its regulations contained in 6 New York Code Rules and Regulations (N.Y.C.R.R.) Part 617.

After a series of self-imposed contractual constraints instituted by the County from 1983-85, including the Midway Case Stipulation, the later Terminal Capacity Agreement, and the Statement of Airport Policy by the Westchester County Board of Legislators, limiting the amount of passengers at the terminal to 240 passengers each half hour, work commenced on an update of the ALP and Master Plan.

In October 1986, a Draft Master Plan Update report and detailed Draft EA/EIS were published and circulated setting forth the proposed action of 14 items of improvement for the Airport, including a new passenger terminal parking facilities, and airport perimeter road and their associated environmental effects were analyzed. The documents were the subject of intensive public scrutiny and evaluation, including a public hearing and extended comment period.

In February 1988, the final EA/GEIS of the Airport was issued and distributed to all interested agencies, entities and persons under State and Federal law. The County also agreed to conduct a project site specific environmental review of the Terminal

Project, as a supplement to the EA/GEIS. Subsequently, a Draft EA/EIS was issued and distributed in August 1988, containing more specific detail on the passenger terminal, associated parking structure, relocated access roads and rental car facilities. A public hearing was conducted on the Draft EA/EIS and an extensive public comment period was afforded to all who wished to participate.

Consequently, a supplemental EA/FEIS was completed and circulated to State and County officials and all other interested agencies, entities and persons for comment in November 1988. In the EA, notwithstanding the County's firm commitment to limiting the capacity of the Terminal to 480 passengers per hour, additional

analysis was conducted without those constraints using a "worst case" scenario.

Furthermore, the FAA issued in March 1989 a detailed and thorough Preliminary Analysis (PA) of the County's EA and voluntarily provided a 30 day period for public comment as an extra step in the review process.

Prior to issuing the ROD and FONSI on November 30, 1989, the FAA further reviewed and considered each comment posed by the public of its PA and provided further independent analysis regarding terminal capacity/use, the October 1989 Analysis (OA), which the FAA incorporated in the FONSI.

In addition to fully and meticulously addressing terminal capacity/use, the FONSI thoroughly reviewed and summarized each of the project areas of concern -- including noise, compatibility and use, vehicular traffic, terminal size and location, terminal ramp area, airport capacity, air and water quality, social/economic impacts public hearing/ comments and mitigation measures.

By letter dated February 28, 1990 addressed to Westchester County Executive Andrew P. O'Rourke, the FAA issued an approval of the Westchester County Airport Layout Plan (ALP), a map reflecting the proposed projects.

The Decision of the Second Circuit

On January 24, 1990 and March 19, 1990, respectively, the Petitioners, municipalities and citizens groups in the vicinity of the Airport, filed petitions for review pursuant to 49 U.S.C. §1486 of two orders of the FAA, the ROD and FONSI issued on November 30, 1989 and the Airport Layout Plan (ALP) approval issued on February 28, 1990.

The Petitioners raised the following contentions on appeal to the United States Court of Appeals for the Second Circuit: (1) the issues before the Court were not ripe for review; (2) the FAA violated NEPA by failing to circulate for public comment its independent analysis of the likelihood

that a new terminal will result in increased Airport use; (3) the required State and local review process never took place; (4) the FAA acted arbitrarily and capriciously in issuing the FONSI and ROD by not requiring a full environmental impact statement (EIS); (5) the FAA failed to give adequate consideration to the cumulative impact of the Airport project; and (6) the public controversy surrounding it and (7) available alternatives.

The Court of Appeals for the Second Circuit denied the petitions for review. Town of Rye v. Skinner, 907 F.2d 23 (2d.Cir.1990). In so ruling, the Court of Appeals rejected each of the claims and contentions specifically raised by Petitioners in

their appeal. In particular, the Court found to be without merit, Petitioners' claim that the FAA violated NEPA by failing to circulate for public comment its independent analysis of the likelihood that a new terminal will result in increased Airport use. To the contrary, the Second Circuit concluded that "[W]hile NEPA and the regulations promulgated under it encourage public involvement in the preparation of environmental assessments, the FAA more than complied with this requirement," by conducting public hearing and receiving comments on every draft environmental assessment and circulating for comments its PA of the EA. Moreover, the Second Circuit further acknowledged that FAA's independent analysis of October 1989

itself was done in response to comments of the Petitioners.

SUMMARY OF ARGUMENT

This case is not of special importance and the United States Court of Appeals' decision conflicts neither with decisions of this Court nor other Circuits.

Essentially unraised below, Petitioners may not argue an illusory theory of the principles of fundamental fairness concerning public involvement in the NEPA process in this Court. Moreover, Petitioners' contentions with respect to requiring more stringent standards for Federal Aviation Administration (FAA) regulations governing public participation in environmental reviews of Airport Projects are best addressed to Congress.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition does not present special or important reasons warranting review

Petitioners assert that the United States Court of Appeals for the Second Circuit erroneously rejected its claim that the FAA's failure to circulate the October 1989 Analysis for public comment violated NEPA.

This Court, however, has never regarded its function as simply correcting a legal error perceived by disappointed litigants in a lower Court decision. To the extent Petitioners seek clarification or a change of Federal statutory law or Federal agency regulations or rules, that role is best left to Congress.

As recognized by the Second Circuit's opinion, Petitioners here asserted public participation requirements for environmental review which are beyond the purview of NEPA. The Second Circuit drew upon previous opinions in Hanly v. Kleindienst, 471 F.2d 823 (2d Cir.1972) cert denied, 412 U.S. 908 (1973), Town of Orangetown v. Gorsuch, 718 F.2d 29(2d Cir.1983) cert denied, 465 U.S. 1099 (1984) and City of New York v. United States Department of Transportation, 715 F.2d 732 (2d Cir. 1983) cert denied and app dismd, 465 U.S. 1055 (1984) in support of its analysis.

Nor does the plain language of the regulations, rules and orders of the FAA support Petitioners' arguments.

Regulations of the Council on Environmental Quality (CEQ regs), 40 C.F.R. Part 1500; FAA Order No. 5050.4A.

Moreover, as the Second Circuit observed, the FAA's consideration of public controversy was apparent since the Airport project is categorically excluded from environmental review (see FAA Order 5050.4A §§20(b), 23(a)(4)). Notwithstanding the exclusion, the FAA had nevertheless, decided to prepare an environmental assessment in recognition of community opposition to the project. Town of Rye v. Skinner, 907 F.2d at 25.

B. No violation of the general principle of fundamental fairness by the FAA was specifically raised by Petitioners below

In a belated attempt to introduce a new theory for challenging the Second Circuit's decision denying their petitions for review, Petitioners for the first time now raise the purported claim that the FAA violated general principles of fundamental fairness set forth by the dictum of Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 288, n.4 (1974) by failing to circulate for further public comment its independent analysis of the likelihood that a new terminal will result in increased Airport use.

No such legal claim or theory premised on this Court's dictum in Bowman was specifically asserted by the Petitioners below and thus was not addressed by the Court of Appeal's decision.

This Court has held that it will not address a contention or theory not raised in the Court of Appeals and not addressed by that court. Rogers v. Lodge, 458 U.S. 613 (1982) reh den, 459 U.S. 899 (1982). Nor will this Court consider the merits of a claim or theory upon which the Court of Appeals, in view of the disposition of the case, did not pass. Calmar S.S. Corp. v. United States, 345 U.S. 446 (1953).

Accordingly, since Petitioners did not raise or rely upon the general principles of fundamental fairness theory below and the Second Circuit consequently had no opportunity to pass upon the applicability of such a theory, any such contention is now foreclosed as untimely for assertion in this Court.

C. There is no conflict between the Court of Appeals decision below and decisions of this Court

Even assuming arguendo, this Court should somehow entertain Petitioners' newly raised fundamental fairness principles contention, contrary to Petitioners' suggestions, there is no conflict between the decision of the Court of Appeals for the Second Circuit and the dictum of this Court in Bowman Transportation, Inc.v. Arkansas-Best Freight System, Inc., 419 U.S. 218 (1974).

Bowman is clearly inapposite as that case concerned the due process rights of parties to a formal adjudication by the Interstate Commerce Commission, pursuant to the trial-type procedures set forth in the Administrative Procedure Act, 5 U.S.C.

§§554, 556-557, a situation not presented here.

Nor is there obviously any conflict between the Second Circuit's disposition and Pension Benefit Guaranty v. LTV Corp., _U.S._, 110 S.Ct. 2668 (1990) and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). In each of these cases, this Court has held that unless the Administrative Procedure Act, the plain language of agency statutes or regulations, or constitutional due process provides otherwise, courts may not impose additional procedures on agencies, notwithstanding the principles of fundamental fairness.

The FAA here, as the Second Circuit concluded, more than complied with NEPA, the regulations promulgated under it and the FAA's own order, in terms of encouraging public involvement in environmental assessments.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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White Plains, New York
October 24, 1990

GLOSSARY OF ACRONYMS

ALP - Airport Layout Plan

CEQ - Council on Environmental Quality

EA - Environmental Assessment

EIS - Environmental Impact Statement

EPA - Environmental Protection Agency

FAA - Federal Aviation Administration

FEIS - Final Environmental Impact Statement

FONSI - Finding of No Significant Impact

GEIS - Generic Environmental Impact Statement

NEPA - National Environmental Policy Act

OA - October 1989 Analysis-Demand, Capacity and Operational Analysis of Westchester County Airport

PA - Preliminary Analysis

ROD - Record of Decision

SEQRA - State Environmental Quality Review Act

Supreme Court, U.S.
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(3)

No. 90-520

In the Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF RYE, NEW YORK, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4332, *et seq.*, requires an agency to subject its proposed decision, and the bases for the decision, to public comment before issuing a finding of no significant environmental impact.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-520

TOWN OF RYE, NEW YORK, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6), which was issued on consolidated direct review of the agency decisions, see Federal Aviation Act of 1958, 49 U.S.C. App. 1486, is reported at 907 F.2d 23.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1990. The petition for a writ of certiorari was filed on September 24, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a proposal by Westchester County to replace the terminal and associated facilities at Westchester County Airport (the Airport), which the County owns and operates. Petitioners challenged the procedures used by the FAA in approving the project under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 *et seq.*, and associated FAA regulations, Federal Aviation Orders 5050.4A (1985) and 1050.1D (1983).[1] The case originated in the court of appeals on direct petition for review of two FAA orders: the Record of Decision (ROD) approving, *inter alia*, the replacement of the terminal and improvement of parking facilities, and the approval of the Airport Layout Plan (ALP), a map (C.A. App. A374) reflecting the proposed new projects. The two petitions, which raised identical legal issues under NEPA, were consolidated below.

The proposal that is the subject of the FAA's review is the replacement of the current 10,000 square foot terminal at the Airport—a World War II quonset hut moved to the site in 1946 (EA Vol. I at 1-1)[2] —with a 43,000 square foot modern terminal.[3] Due

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[1] FAA orders cited herein are contained in a separate addendum of statutes and regulations in the court of appeals.

[2] The five volumes of the Environmental Assessment are not consecutively paginated. Each volume is divided into chapters and the page numbers begin anew at the start of each chapter. Thus, "EA Vol. I at 1-2" refers to Chapter 1, page 2, (*not* to pages 1 and 2). Multiple pages are cited, for example, as "EA Vol. I at 1-2 through 1-4" or "1-2 and 1-4").

[3] The Environmental Assessment contains a consultant's description of the need for the proposed project. EA Vol. I at 1-14:

> The usual comments made by the air traveler about [the existing] facilities at Westchester County Airport should

to the limited space and short runways, the Boeing 737 is the largest aircraft the Airport can regularly accommodate, but there is no proposal to increase the length or number of runways at the airport or to increase gates at the terminal. See *id.* at 1-13. The current caps on aircraft size, which the proposed improvements will not change, limit not only the number of passengers, but the destinations that can be reached from Westchester.

1. a. Westchester County submitted a proposed terminal replacement project to the FAA, which was required to review the proposal for its environmental impacts under NEPA.[4] Normally, the FAA is not required to conduct a formal environmental assessment for passenger handling facilities. See FAA Order 5050.4A (23).[5] Because of the interest in the

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not be repeated in polite society and shall not be stated in this professional document. One need only visit the airport once as a traveler to immediately share the "experience" of all who have gone before.

The passenger terminal building is often quaintly described as a quonset hut; indeed, it is just that, having been brought to its present site from Guam in 1946. The hut is hardly quaint; it is dysfunctional as a passenger processing facility, providing scarcely any essentials and none of the amenities expected by a civilized society.

[4] Approval by the FAA is required for changes in a federally-obligated airport that might affect the safety, efficiency, or utility of the airport. FAA approval is reflected on the Airport's ALP, or Airport Layout Plan, a map of the airport showing the current or approved facilities.

[5] In the NEPA context, a "categorical exclusion" is a discrete class of actions identified by the agency as not normally causing significant environmental effects. Agencies are required by the Council on Environmental Quality (CEQ) regulations, 40 C.F.R. 1507.3, to promulgate regulations, subject

project in the surrounding communities, however, the FAA chose to prepare an assessment of the potential environmental effects of the proposed terminal project and the ancillary projects. See FAA Order 5050.4A(24(b)).

The County, as the sponsoring agency, produced for the FAA's use a joint federal environmental assessment and New York State environmental impact statement.[6] The County circulated this document to the States of New York and Connecticut, to all of the affected towns (including petitioner towns), and to local libraries and interested organizations and individuals. EA Vol. VI, Doc. 1 (transmittal letter).

In total, the County prepared three major studies of the Airport improvement project for public comment: a February 1987 Master Plan Update Study/Environmental Assessment/Final Generic Environmental Impact Statement (EA Vol. V); an August 1988 Draft Environmental Assessment and Environmental Impact Statement (EA Vol. IV); and a November 1988 Environmental Assessment and Final Environmental Impact Statement on the Terminal Facilities Modernization Project (EA Vols. I-III).

b. Formal public participation began in August 1986, when the County's consultant notified 28 state, local, and federal agencies of the proposal to prepare an environmental assessment/environmental impact

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to full notice and comment, listing their categorically excluded actions. Actions that fall within a categorical exclusion are generally entirely exempt from NEPA analysis.

[6] The County chose voluntarily to comply with the environmental impact statement requirements under the State Environmental Quality Review Act (SEQRA), art. 8, N.Y. Envtl. Conserv. Law, §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1990).

statement for improvements to the Airport. EA Vol. V, App. C. On November 13, 1986, the County held a public hearing, attended by more than 300 people (including some of the petitioners), to discuss the draft of the Master Plan Update Study (ultimately released in February 1987). See Supplementary Material, *id.* at 6-1 through 6-2. The County accepted written comments on the draft for two weeks thereafter. *Ibid.*

In August 1988, the County prepared and circulated the Draft Environmental Assessment/Envirmental Impact Statement to an expanded mailing list, including petitioners. See EA Vol. VI, Doc. 1 (transmittal letter from Westchester County dated August 25, 1988, with attached list of addressees). On October 4, 1988, the County held another public hearing (attended by more than 200 people). EA Vol. II at 6-1. Among the commentators (at both hearings) were some of the petitioners, represented by counsel and their own elected representatives. The County also announced that it would accept additional written comments on this draft for two weeks thereafter. *Ibid.* In November 1988, the County issued the Final Environmental Assessment/Environmental Impact Statement, including all the prior comments submitted on the draft, and responses to them. EA Vols. I-III.

Although not required to do so by the regulations, the agency also prepared a "Preliminary Analysis" of the Environmental Assessment in order to provide the public with an additional opportunity for comment before the decision was made whether or not to prepare a full-fledged environmental impact statement. The Preliminary Analysis used the information in the environmental assessment, an FAA com-

missioned noise analysis, and various comments received by the County on the draft to reanalyze the possibility of significant impact of the project. See C.A. App. A123-A144. The Preliminary Analysis was circulated for comments to a total of 111 interested persons, agencies, and municipalities, including many, if not all, of the petitioners, as well as to the public libraries in the towns nearby the airport. See Distribution List for Preliminary Analysis, EA Vol. VI, Doc. 2.

The FAA received a large number of comments on the Preliminary Analysis, including extensive comments from petitioners' counsel on their behalf. Those comments raised before the federal agency for the first time certain issues concerning the methodology used to forecast the airport's likely traffic with and without the terminal. C.A. App. A145-A168. As a result, the agency prepared a traffic forecast using methods suggested by commentators.[7] On May 15, 1989, the agency notified many of the commentators, including petitioners, that "some issues raised do deserve further analysis and that analysis has begun. If the analysis shows that our preliminary findings are invalid or otherwise require change, we will not hesitate to make those adjustments for our final findings." EA Vol. VI, Doc. 3.

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[7] As requested by petitioners in their comments, the agency conducted an analysis based on market penetration, see C.A. App. A158-A160, and shorter turnaround times at the gates, see *id.* at A154-A156. The only significant comment rejected by the agency in analyzing Airport traffic was the suggestion to ignore the number of gates available at the Airport on the theory that aircraft could be loaded and unloaded on the tarmac by walking passengers some distance to and from waiting aircraft. *Id.* at A153-A154.

c. On November 30, 1989, the FAA rendered its final decision in two documents—the Record of Decision (ROD) (Pet. App. A7-A14) and the Finding of No Significant Impact (FONSI) (*id.* at A15-A45), which were the subject of petitioners' first petition for review. Both documents attached a copy of the FAA's "Demand, Capacity and Operational Analysis of Westchester County Airport Terminal Facilities Modernization Project Environmental Assessment." *Id.* at A49-A62. On the basis, in significant part, of the factors recommended by petitioners, this analysis concluded that the proposed new terminal would not result in a significant increase in airport traffic because (1) traffic is a function of demand and physical constraints on airport use (runways, gates) (*id.* at A50-A52); (2) demand varies according to flight availability and destinations, not terminal comfort or aesthetics (*id.* at A7-A8); and (3) as a physical matter, the old terminal, though uncomfortable and less safe, could accommodate the projected demand. *Id.* at A60. This last conclusion is based on the agency's knowledge, from its experience with overcrowded airports, that peaks in traffic can, and will be, accommodated by "peak spreading"—that is, the movement of flights from high demand time periods into adjacent time periods.

Shortly thereafter, on February 28, 1990, the FAA issued its approval of the Airport Layout Plan for the terminal modification projects, C.A. App. A335-A337, A374,[8] which petitioner challenged in its sec-

[8] The approval noted that the FAA would be required to conduct additional environmental review should certain steps be taken or proposed that could increase the airport's air traffic capacity, including "longer/stronger runways; additional aircraft gate position[s]; increased terminal ramp

ond petition for review.[9]

2. In the court of appeals, petitioners challenged the lawfulness of the procedures used by the FAA in issuing the Record of Decision and the Finding of No Significant Impact and in approving the Airport Layout Plan.[10] Specifically, petitioners contended that the FAA had violated procedures required by NEPA and FAA regulations by failing to circulate the "Demand, Capacity and Operational Analysis" prepared in response to petitioners' comments on the FAA's Preliminary Analysis, and that the FAA had failed to follow its own regulations requiring state and local review of certain proposed projects. Pet. C.A. Br. 22-29. Petitioners further argued that the FAA's determination that the proposed project would not

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strength and capacity; or a deviation from FAA dimensional standards, that has the potential for increasing the capability to accommodate more or larger aircraft." C.A. App. A336. See Pet. App. A8.

[9] On November 7, 1990, a County referendum resulted in voter approval for a bond issue to finance a 41,000 square foot terminal. It is our understanding that the County now proposes to build this somewhat smaller terminal.

Other improvements submitted for approval as part of the Airport improvement project include: a new indoor parking facility and rental car offices; a new perimeter road system to prevent vehicles from having to cross active runways; replacement of existing crash-fire-rescue facilities; a new runway lighting system; and clearance of obstructions on property adjacent to the airport at the end of the runways. None of these ancillary projects has been challenged by petitioners.

[10] Before the court of appeals, petitioners also argued that the challenged FAA actions were not ripe for review because no funding for the Airport project had actually been approved. The court of appeals rejected this argument, and petitioners do not renew it in this Court.

create any significant environmental impacts was arbitrary and capricious. *Id.* at 29-45.[11]

In a per curiam opinion, the court held that petitioners' "claim that the FAA violated the National Environmental Policy Act * * * by failing to circulate for public comments its independent analysis of the likelihood that a new terminal will result in increased Airport use" is "without merit" because the agency "more than complied" with all statutory and regulatory requirements. Pet. App. A4. As the court explained (*ibid.*):

> the FAA and Westchester County conducted public hearings and received written comments on every draft environmental assessment; the FAA circulated for comment its Preliminary Analysis of the environmental assessment; and the FAA's independent analysis itself was done in response to comments of petitioners. NEPA requires no more.

The court also held that the record did not support petitioners' claim that the required "state and local review process" did not take place. The FAA's obligations in this area were satisfied by sending the

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[11] Petitioners faulted the agency's assessment of the environmental impact of the project on the grounds that (1) the FAA failed adequately to account for potential cumulative effects of an independent Postal Service facility that the government was tentatively planning to build on adjoining land; (2) a finding of no significant impact under federal law was, by definition, inconsistent with the County's determination that an environmental impact statement was necessary under New York State law; (3) "simple logic" dictated a finding of significant potential impacts; (4) public controversy concerning the project required a finding of significant impact; and (5) the Environmental Assessment's discussion of alternatives was inadequate.

draft environmental assessment to the designated New York "single point of contact" for state and local review purposes, and by obtaining comments from local governments and concerned citizens at several points in the review process. Pet. App. at A4-A5.

Finally, the court of appeals rejected each of petitioners' attacks on the merits of the FAA's decision of no significant environmental impact, holding that (1) the FAA examined "in some detail" the potential cumulative impacts of the Postal Service facility, which, in any event, might never be built; (2) the FAA considered public controversy by subjecting this proposal to an environmental assessment not strictly required by NEPA or FAA regulations; and (3) the consideration of alternatives in the Environmental Assessment was adequate, given the agency's valid finding of no significant impact. Pet. App. A5-A6.

ARGUMENT

This case does not warrant the Court's review for two reasons. First, there is no merit to petitioners' argument that the procedures followed by the agency in approving the Westchester Airport project violated a supposed "rule of fundamental fairness." Pet. 24-34. Second, petitioners' "fundamental fairness" argument was neither presented to, nor considered by, the court of appeals, and is made for the first time before this Court.

1. In a long line of cases interpreting the obligations of agencies under NEPA, this Court has consistently held that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978); *Robertson* v. *Methow Val-*

ley Citizens' Council, 109 S. Ct. 1835, 1847 (1989) ("NEPA does not require agencies to adopt any particular internal decisionmaking structure," quoting *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.* 462 U.S. 87, 100 (1983)); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies * * * is quite precise, and the role of the courts in enforcing that duty is similarly precise.").

Petitioners challenge the procedures followed by the FAA in this case in preparing an Environmental Assessment. But, an Environmental Assessment is not a document required by the terms of NEPA. These assessments are purely creatures of agency regulations designed to help the agency decide whether the triggering event for NEPA—the existence of a proposal for "major Federal action[] significantly affecting the quality of the human environment"—has occurred. Only if a project is found to have a significant expected environmental impact does NEPA require the agency to prepare and circulate for public comment a "detailed statement" on the environmental effects of the proposal and reasonable alternatives to it. 42 U.S.C. 4332(C). The "detailed statement," known as an environmental impact statement, or EIS, must be circulated in draft for public comment before issuance in final form. See *ibid.*

The FAA did not prepare an EIS here. It prepared an "environmental assessment" for the sole purpose of evaluating whether the effects of the proposed Airport project would be sufficient to warrant the preparation of an EIS. The FAA concluded that the effects would not be significant, and issued a Finding of No Significant Impact and a Record of Decision reflecting its approval of the project for further

processing in accordance with the FAA's statutory mandate.

Although NEPA is silent on the procedures that must accompany preparation of an environmental assessment, the FAA's obligations at this stage are spelled out with specificity in the Council on Environmental Quality's (CEQ) regulations (see 40 C.F.R. 1500 *et seq.*), supplemented by the FAA's own regulations (contained in FAA Orders 5050.4A and 1050.1D). Nowhere do any of these regulations require the federal agency to circulate an environmental assessment—or any part of it—for public comment before finalizing the assessment, nor do they require the agency to circulate the draft or final assessment for public comment before making a decision whether to prepare an EIS or to issue a finding of no significant impact. 40 C.F.R. Pt. 1501.[12] At most, the regulations direct the agency to "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. 1501.4(b). The FAA's regulations are consistent with this directive, holding that the agency retains discretion to schedule public hearings during the preparation of an environmental assessment, if "appropriate" under CEQ regulations (see FAA Order 5050.4A § 49(b) and (e)), and requiring "state and local review" at appropriate times during the planning process (see *id.* § 48).

In contrast, the CEQ regulations specifically direct the agency to invite comments following the comple-

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[12] In certain circumstances, not relevant here, the regulations require the agency to circulate the Finding of No Significant Impact for 30 days before making its final determination concerning the significance of any impacts. 40 C.F.R. 1501.4(e)(2).

tion of every draft EIS.[13] There is no counterpart to the EIS comment procedure for environmental assessments under CEQ regulations or, for that matter, under the supplemental FAA regulations, and petitioners cite to none. Moreover, petitioners do not dispute in this Court that the FAA complied with the letter of the regulations that apply to environmental assessments.[14]

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[13] The agency must invite comments on the final draft EIS from affected state, local, and Indian interests, the applicant (if there is one), and the public. 40 C.F.R. 1503.1(a)(1)-(4). The agency must consider those comments, and respond to them in the final statement. 40 C.F.R. 1502.9(b).

FAA regulations elaborate on CEQ's requirements. Like its CEQ counterpart, FAA's "Airport Environmental Handbook" (FAA Order 5050.4A) contemplates a full opportunity for written public comments on every draft environmental impact statement (§§ 90-93), but does not require circulation and comment opportunity following preparation of environmental assessments. See FAA Order 5050.4A §§ 43-52. FAA's "Policies and Procedures for Considering Environmental Impacts" (FAA Order 1050.1D) also contemplates full notice and public comment on draft impact statements, but not environmental assessments. FAA Order 1050.1D. Compare Chart 1 of Attachment 1 (EA processing does not require public comment) to Chart 3 of Attachment 1 (EIS processing requires opportunity for review and comment by public).

[14] Nor could they. The record demonstrates that the state and local review process mandated by FAA regulation (FAA Order 5050.4A § 48), plus *two* public hearings, did take place. Westchester County circulated the February 1987 draft of the environmental assessment to the State Clearinghouse, as well as to dozens of other interested individuals, groups, agencies and municipalities, including petitioners. EA Vol. VI, Doc. 1. The County received, responded to, and transmitted to the FAA all of the comments received in this process. See, *e.g.*, EA Vol. I, ch. 5.

Under this Court's decisions, agencies may not be required to follow procedures over and above those mandated by NEPA or its implementing regulations. Similarly, in construing the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, this Court has specifically disapproved the notion that agencies must comply with procedures required neither by the Due Process Clause of the Constitution nor by statutes or regulations.

As recently as last Term, in *Pension Benefit Guar. Corp.* v. *LTV Corp.* (*PBGC*), 110 S. Ct. 2668 (1990), this Court reaffirmed that principle. In *PBGC*, respondents challenged the failure of the Pension Benefit Guaranty Corporation to provide interested parties an opportunity to comment on the materials on which PBGC relied in reimposing pension plan obligations on respondent LTV Corporation following its reorganization. Like petitioners here (Pet. 24-25), some of the respondents in that case relied on *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974), to argue that the procedures followed by the PBGC were unfair.

This Court rejected that contention and distinguished *Bowman*, which involved a failure to permit comment in the context of a formal adjudication pursuant to the trial-type procedures of the APA under 5 U.S.C. 554, 556-557.[15] *PBGC* v. *LTV*, 110 S. Ct. at 2680-2681. The Court held that for informal agency adjudications, the only procedural requirements are

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[15] As this Court noted, those sections of the APA "include requirements that parties be given notice of 'the matters of fact and law asserted,' § 554(b)(3), an opportunity for 'the submission and consideration of facts [and] arguments,' § 554(c)(1), and an opportunity to submit 'proposed findings and conclusions' or 'exceptions,' 557(c)(1), (2)." 110 S. Ct. at 2681.

those set forth in 5 U.S.C. 555. A failure to follow more elaborate procedures, where "the Due Process Clause itself does not require them * * * is therefore not unlawful." 110 S. Ct. at 2681.

Petitioners here make exactly the arguments the Court rejected in *PBGC*. Petitioners seek to bring themselves within the "fundamental fairness principles found in *Bowman* and elsewhere" (Pet. 33) by relying on the Court's statement in that case that "[a] party is entitled * * * to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies." As the Court in *PBGC* held, that statement applies only in the context of "formal adjudication * * * pursuant to trial-type procedures set forth in §§ 5, 7 and 8 of the APA," which contain specific requirements for notice and opportunity for comment that go far beyond those imposed by NEPA or the regulations applicable in this case. 110 S. Ct. at 2680-2681. And, as with *PBGC*, this is not a case where the Due Process Clause requires additional procedures, and petitioners do not suggest that it is. Nor, as we have explained, is it a case in which any statute or regulation requires the procedures petitioners demand here.[16] For

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[16] Petitioners cite a number of court of appeals and district court cases (Pet. 28-32) for the proposition that courts, in the name of "fundamental fairness," have required procedures in addition to those undertaken by the FAA. Their citations are widely off the mark. *National Wildlife Fed'n* v. *Burford*, 835 F.2d 305 (D.C. Cir. 1987), see Pet. 29, was an appeal from a grant of a preliminary injunction, not a decision on the merits, and was, in any event, reversed last Term by this Court in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990). In *Lujan*, this Court held that the plaintiff in that case lacked standing to sue. Petitioners therefore

these reasons, petitioners' arguments are without merit, and there is no warrant for further review by this Court.

2. This Court should also decline to review this case because petitioners' arguments were not fairly

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err in suggesting that the court of appeals' decision in that case remains good law.

Petitioners also err in relying on a number of lower court NEPA decisions, including *Essex County Preservation Ass'n* v. *Campbell*, 399 F. Supp. 208 (D. Mass. 1975), aff'd, 536 F.2d 956 (1st Cir. 1976). All of those cases involve the public participation requirements for the preparation of an environmental impact statement, not an environmental assessment. As we have explained, the procedures required for an EIS are far more elaborate than for an EA.

Also inapposite is *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982). See Pet. 28. In that case, the court found that the United States Maritime Administration unlawfully failed to disclose a report containing the facts and reasoning on which it based an informal adjudicatory approval of certain maritime applications. Here, in contrast, the FAA fully complied with any applicable requirement that it circulate its decision, with reasons, and identify the material on which it was based. The Demand, Capacity and Operational Analysis (Pet. App. A49-A62), which spells out the agency's assessment of the effects of the project and is the focus of petitioners' challenge, was attached both to the agency's lengthy FONSI (*id.* at A15-A48), and to its ROD (*id.* at A7-A14). Both of the latter documents are public documents that were widely circulated.

Finally, petitioners cite (Pet. 25-27) *United States Lines, Inc.* v. *Federal Maritime Comm'n*, 584 F.2d 519, 534 (D.C. Cir. 1978), and cases cited there, for the unremarkable proposition that, in informal adjudication and rulemaking, agencies may not rely on information in their files without informing interested parties of the data they have utilized. That case says nothing to suggest, as petitioners contend, that agencies must, in informal contexts, circulate the data on which they ultimately rely for public comment *before* reaching their decision.

raised below. Petitioners articulated two substantive issues for the court of appeals to review, neither of which alleged any violation of a "rule of fundamental fairness." Nor did their briefs present this issue in any form: in 72 pages of briefing, the words "fundamental fairness" never appear. Instead, petitioners urged that the FAA's actions violated NEPA and the agency's own regulations, and it was on the basis of these arguments that the court of appeals ruled. Petitioners may not now seek this Court's review of issues they did not properly raise below. *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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